85-1346

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Petitioner,

vs.

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether an ocean carrier remains a bailee of cargo after delivery of the cargo at the port of destination into the possession of the local port authority as there required.

2. Whether the pallets or the number of bags contained thereon are "Cogsa" packages for the purpose of the $500. per package limitation, 46 U.S.C. 1304 (5) where the Bill of lading states "150 pallets said to contain 6,000 bags."

3. Whether a shipper can make the carrier an insurer by merely stating the value of the shipment on the fact of the bill of lading without paying the *ad valorum* freight rate as required by the carrier's tariff filed with the Federal Maritime Commission.

4. Whether foreign law applies to a tort committed abroad.

PARTIES TO THE PROCEEDINGS

The parties having an interest in the outcome of this case pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed in order that the Justices of this Court may evaluate possible disqualification or recusal, and are as follows:

1. Companhia de Navegacao Lloyd Brasileiro, a foreign corporation owned by a Federative Republic of Brasil.

2. Allied Chemical International Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons For Granting The Petition For Writ of Certiorari	4
1. There Is A Conflict Between Circuits As To The Obligation Of The Ocean Carrier Following Delivery Of Cargo To A Port Authority	4
2. The Function Of The Federal Court System Is To Insure Uniformity In The Application Of Maritime Law	6
3. The Court Below Improperly Found The Carrier Liable For An Ad Valorum Bill Of Lading	9
4. Foreign Tort Law Should Apply	11
Conclusion	13
Appendix A	A-1
Appendix B	A-8
Appendix C	A-10
Appendix D	A-29

TABLE OF AUTHORITIES

	Page
All Commodities Supplies Ltd. v. M/V Acritas, 1982 AMC 166 (ED. La. 1981) (not officially reported)	4
Allied International v. Yang Ming, 672 F.2d 1055 (2nd Cir. 1982)	8, 9
Allstate Insurance v. Imparca Lines, 646 F.2d 166 5th Cir. (1981)	4, 5, 6
Bahrain Insurance Co. v. M/V Trein Maersk, 1984 AMC 354 (SDNY 1984) (not officially reported)	8, 9
Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415 (5th Cir. 1981)	9
Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291 (2nd Cir. 1974)	8
Consol. Intl. Corp. v. Falcon, 1983 AMC 270 (SDNY 1982) (not officially reported)	5
Constable v. National Steamship Company, 154 U.S. 51, 14 S.Ct. 1062, 38 L.Ed. 903 (1894)	4, 6
David Crystal, Inc. v. Cunard Steam-Ship Co., 339 F.2d 295 (2nd Cir. 1964)	5, 6
DuPont de Nemours International v. S.S. Mormacvega, 493 F.2d 97 (2nd Cir. 1974)	8
Exim Industries v. Pan American, 754 F.2d 106, 108 (2nd Cir. 1985)	8
Farrell Lines v. Highlands Ins. Co., 532 F.Supp. 77, aff. 696 F.2d 28 2nd Cir. (1982)	4

	Page
Gordon v. Eastern Air Lines, Inc., 391 F.Supp. 31 (SDNY 1975)	12
Komatsu, Ltd. v. States Steamship Company, 674 F.2d 806 (9th Cir. 1982)	9
La Interamericana v. Delta S.S., 1984 AMC 2972, (ED. La. 1983), aff. 736 F.2d 1524 (5th Cir. 1984)	4
La Seguridad v. Delta S.S., 1981 AMC 996, (SD Fla. 1980)	10
Menley & James Laboratories Ltd. v. M/V Hellenic Splendor, 433 F.Supp. 254 (SDNY 1977)	8
Mitsui & Co. Ltd. v. American Export Lines, 636 F.2d 807 (2nd Cir. 1981)	8
Omark Industries v. Associated Container, etc., 420 F.Supp. 139 (D. Or. 1976)	8
Reed v. Wiser, 555 F.2d 1079, (2nd Cir. 1977) cert. den. 434 U.S. 922	8
Tapco Nigeria, Ltd. v. M/V Westwind, 702 F.2d 1251 5th Cir. (1983)	4, 5
Trotter & Co. v. Delta S.S. Lines, 1985 AMC 2783 (ED Pa. 1982)	7, 8
Wuerttembergische v. M/V Stuttgart Express, 711 F.2d 621, 622 5th Cir. (1983)	10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

Petitioner, Companhia de Navegacao Lloyd Brasileiro, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding after a petition for rehearing and rehearing *en banc* were filed with the aforesaid Court and said petitions were denied by Order dated November 20, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit reported at 775 F.2d 476 of which review is sought was issued October 15, 1985 and is printed as Appendix C. The proceedings below prior to that opinion were as follows:

On January 18, 1985, a decision was rendered by District Judge Owen after submission of the case based upon stipulated facts and is printed as Appendix A.

A judgment was entered thereon and is printed as Appendix B.

JURISDICTION

Within the time provided, Petitioner moved for a rehearing and a rehearing *en banc* to review the above decision by the Court of Appeals for the Second Circuit. The motion was denied by an order of the Court of Appeals dated November 20, 1985, which is printed as Appendix D. This petition for a Writ of Certiorari was filed within ninety (90) days of that date as required by 28 U.S.C. 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The United States Carriage of Goods by Sea Act, 46 U.S.C. §1300 et seq.

The Harter Act, 46 U.S.C. §190 et seq.

The Pomererne Act, 49 U.S.C. §81 et seq.

STATEMENT OF THE CASE

On September 10, 1981, Allied Chemical International Corp. (Allied) commenced an action in the United States District Court for the Southern District of New York against Companhia de Navegacao Lloyd Brasileiro (Lloyd), a common carrier by water, for the total value of a shipment of 150 pallets said to contain 6,000 bags of a chemical, caprolactum, which was carried

without incident from the Port of Norfolk, Virginia to the Port of Salvador, Brasil where the cargo was discharged and delivered without loss or damage to the governmental Port Authority which was charged by local law and the custom and usage of said port to receive same.

The plaintiff contended that the defendant breached the terms of the contract of carriage and the provisions of the U.S. Carriage of Goods By Sea Act, (COGSA), 46 U.S.C. §1300 et seq. by the carrier's agent signing a letter acknowledging that the ocean freight and merchant marine tax had been paid which letter was improperly used by the ultimate receiver to obtain possession of the shipment from the governmental Port Authority without surrender of the bill of lading. The defendant argued that in accordance with the terms of its bill of lading and pursuant to local custom and usage at the port of discharge it made a valid delivery by delivering the cargo into the custody of the local Governmental Port Authority and was not liable for any subsequent loss. However, if it was liable, its liability was limited to $500. per package (pallet) pursuant to COGSA, 46 U.S.C. 1304(5).

The District Court rendered an opinion on January 18, 1985, virtually adopting plaintiff's proposed Findings of Fact and Conclusions of Law without comment or recitation of authority and awarding plaintiff a full recovery. That decision is set forth in Appendix A.

On appeal, the Second Circuit Court of Appeals, while critical of the District Court's opinion, affirmed the District Court's award in favor of the plaintiff.

The basis for affirmance of the District Court was an erroneous conclusion as to the law of maritime carriage in conflict with settled authorities concerning delivery to the local governmental port authority, the misapplication of the law of bailment and the disturbance of the settled law on package limitation under COGSA, 46 U.S.C. §1304 (5)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. THERE IS A CONFLICT BETWEEN CIRCUITS AS TO THE OBLIGATION OF THE OCEAN CARRIER FOLLOWING DELIVERY OF CARGO TO A PORT AUTHORITY.

The Second Circuit held below that the ocean carrier remained liable as a bailee of the cargo following delivery to the Port Authority in Salvador, that as bailee it had a continuing responsibility for delivery of the goods and that any bill of lading clauses to the contrary were void and unenforceable.

This decision is contrary to the prior decision of the Second Circuit in *Farrell Lines v. Highlands Ins. Co.*, 532 F. Supp. 77, aff. 696 F.2d 28, (1982), the decisions of the Fifth Circuit in *Allstate Insurance v. Imparca Lines*, 646 F.2d. 166 (1981), and in *Tapco Nigeria, Ltd. v. M/V Westwind*, 702 F.2d 1251 (1983) and the decision of this Court in *Constable v. National Steamship Company* 154 U.S. 51, 14 S.Ct. 1062, 38 L.Ed. 903 (1894). A similar result was reached in *All Commodities Supplies Ltd. v. M/V Acritas*, 1982 AMC 166 (ED. La. 1981) (not officially reported) and in *La Interamericana v. Delta S.S.* 1984 AMC 2972, 2978 (ED La.1983) aff. 736 F.2d 1524 (5th Cir. 1984).

In *Constable v. National Steamship Co.*, this Court held at page 154 U.S. 63.:

> "No rule is better settled that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility".

More recently, the Fifth Circuit Court of Appeals in *Allstate Insurance v. Imparca Lines*, supra, concluded that delivery to the Venezuelan Port Authority discharged the carrier's obligations. The Court at 646 F.2d 169 stated:

> "We conclude the evidence overwhelmingly supports the district court's finding of fact that the container was unloaded from the vessel and placed on the dock

> in the control of INP. This constitutes delivery as a matter of law, in accordance with the bill of lading and the custom and usage of the port. The district court's legal conclusion that delivery never occurred is thus in error, and is accordingly reversed. Delivery had taken place, and the carrier's responsibility for the goods was discharged before the container disappeared, and accordingly the district court shall on remand enter judgment for Imparca."

The Court approved clause 12 of the *Imparca* bill of lading which is identical to the clause contained in petitioner's bill of lading which read:

> "The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities . . ." Imparca, supra, at 646 S 2nd 167 n.1.

In *Tapco Nigeria Ltd. v. M/V Westwind*, at 702 F.2d 1262 the Fifth Circuit held that there was good delivery under the Harter Act when the cargo was delivered . . . .

> "to persons charged by law and usage of the port with the duty to receive cargo and distribute it to the consignee." See also *Consol Intl. Corp. v. Falcon*, 1983 AMC 270 (SDNY 1982) (not officially reported).

The Court below erroneously relied on the case of *David Crystal, Inc. v. Cunard Steam-Ship Co.* 339 F.2d. 295 (2nd Cir. 1964) for the proposition that an ocean carrier has a continuing obligation as a bailee following discharge of cargo onto a receiving pier. In that case, the cargo was discharged into the hands of the carrier's independent stevedore and subsequently was misdelivered by the carrier's agent through use of a fraudulent delivery order. There was no contention, in *Crystal*, supra, that the goods had been delivered, constructively or otherwise, to the consignee or to a governmental agency.

In the instant case, the Second Circuit disregarded the numerous decisions that applied the tenents of this Court's promulgation in *Constable*, supra, as relates to the custom and usage at the port of discharge. The *Crystal* decision is clearly not authority for the law of delivery abroad and the effect of compulsory delivery to a foreign governmental port authority and thus was misapplied by the Court below.

The bill of lading clause held void herein by the Second Circuit had been specifically approved by the Fifth Circuit in *Imparca*, supra, at 646 F.2d 167, n.1.

2. THE FUNCTION OF THE FEDERAL COURT SYSTEM IS TO INSURE UNIFORMITY IN THE APPLICATION OF MARITIME LAW.

The bill of lading issued by petitioner read as follows: (quoting from the Court at 775 F.2d 485).

> "The bill of ladin herein contained six columns under the usual general headings 'Particulars Furnished by Shipper'. Only two of those columns and only a few of the items appearing in those columns are important to our decision. The first column, headed "No. of Packages' contained the entry '150'. Immediately to the right of that number, squarely in the column labeled 'Description of Packages and Goods,' was entered 'Double Faced Pallets Said to Contain: 6,000 Bags Caprolactum . . ."

and

> "We conclude that the district court's finding that the parties did not intend the pallets to be packages was not clearly erroneous" at 775 F.2d 486.

The foregoing language of the Second Circuit indicates that the bill of lading clearly sets forths the number of packages to be carried by the vessel; i.e. 150 pallets. Nevertheless, without any other evidence, the Court below improperly held that the District Court's finding regarding the intent of the parties "was not clearly erroneous."

It is clear that there was no evidence of the intent of the parties, other than that set forth in the commercial invoice and the ocean bill of lading wherein each enumerated the number of packages as "150 pallets".

If the panel's opinion remains unmodified, uniformity in the application of maritime law is destroyed and the jurisprudence of *stare decisis* can no longer be relied upon in the preparation of a bill of lading or other shipping documents in ocean commerce.

In *Trotter & Co. v. Delta SS. Lines*, 1985 AMC 2783 (E.D. Pa. 1982) (not officially reported), Judge VanArtsdalen held at page 2792.

> ". . . One purpose of COGSA's package limitation is to describe 'a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that the *parties would easily ascertain at the time of contract* when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation. Nichimen, supra, . . . 462 F.2d at 225, quoting Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, . . . 375 F.2d 943, 946 (2nd Cir. 1976). cert. denied 389 U.S. 831 . . . (1967) (emphasis added).
>
> The goals of uniformity and predictability are best served by considering the manifestation of the parties' intent as evidenced by their own descriptions of 'packages' on documents. As business people routinely engaged in commerce, a shipper and carrier must be presumed to know that the word 'package' is a term of art under COGSA and to have understood the consequences of their actions when they utilized that term in their contracts. See Aluminios, supra . . . 407 F.2 at 156. To ignore the parties' use of the term 'package' would inject more uncertainty into this already troublesome area."

Thus, uniformity in the application of the laws of foreign commerce is a necessity and wholly desirable *Reed v. Wiser*, 555 F.2d 1079, 1083 (2nd Cir. 1977) cert. den. 434 U.S. 922; *Exim Industries v. Pan American*, 754 F.2d 106, 108, (2nd Cir. 1985). To permit Allied to contradict its own use of the term "package" i.e. "pallet", in view of the clear language of the documents would undermine COGSA's goals of uniformity and predictability. *Trotter*, supra, at 1985 AMC 2793.

Also, this will be the first case where the shipper has chosen to palletize its cargo and to list the pallets as the number of packages in a bill of lading that a court has held that it was not the shipper's intent that a pallet would be deemed the shipping package.

It will also be the first case where a Court has postulated that the number of times the number of packages are mentioned in a bill of lading may be determinative of the intention of the parties (at 775 F.2d 485). Was this the intent of the Second Circuit's decision in *Allied International v. Yang Ming*, 672 F.2d 1055 (2nd Cir. 1982) and upon which the Court heavily relied for its rationale in the case presently before this Court?

In these days of containerized cargo, courts have wrestled with the issue as to whether a container is a package. However, container cases involve factors not found in pallet cases, *Yang Ming*, supra. at 672 F.2d 1061. It has been uniformly held that where the bill of lading states that the cargo is palletized, the number of pallets has determined the application of the $500. package limitation. *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291 (2nd Cir. 1974), *DuPont de Nemours International v. S.S. Mormacvega*, 493 F.2d 97 (2nd Cir. 1974), *Bahrain Insurance Co. v. M/V Trein Maersk*, 1984 AMC 354 (SDNY 1984) (not officially reported), *Menley & James Laboratories Ltd. v. M/V Hellenic Splendor*, 433 F.Supp 254 (SDNY 1977), *Omark Industries v. Associated Container, etc.*, 420 F.Supp. 139 (D.Or. 1976), and even where the cargo was not actually palletized, *Mitsui & Co. Ltd. v. American Export Lines*, 636 F.2d 807 (2nd Cir. 1981).

In the *Yang Ming* case, supra, the Second Circuit held at 672 F.2d 1056-7:

> ". . . we are convinced that the case is controlled by the explicit statements in the bill of lading that the total number of packages was thirty. In order to reach a total of thirty, one must count the pallets as 'packages' ".

In *Bahrain Ins. v. Trein Maersk*, supra, at 1984 AMC 357, the District Court affirmed a magistrate's holding:

> "We are of the view, for reasons hereinafter discussed, that the 'package' should be deemed the pallet and that each carton thereon does not represent a separate and distinct COGSA 'package' "

Since all parties to a bill of lading must rely on the judicial interpretation of the provisions inserted in said document, this unusual decision has injected an unsettling ambiguity into the maritime law relative to the carriage of goods which compels analysis, clarification and review of the opinion below so that commercial men may rely on a clear understanding as to the effect of enumerating packages on a bill of lading.

3. THE COURT BELOW IMPROPERLY FOUND THE CARRIER LIABLE FOR AN *AD VALORUM* BILL OF LADING

The Court of Appeals held the petitioner to be an insurer of the goods because the shipper stated the value of the goods on the face of the bill of lading for the purpose of establishing a freight rate. Thus, in the "Description of Packages and Goods" section of the instant bill of lading there was also stated "Rate: $110.00 LT, Value: $1,657.00 LT". The abbreviation LT stands for "long ton", the equivalent of 2,240 pounds. This insertion was solely for the purpose of obtaining the lower regular freight rate for this commodity and had no function in assessing an *ad valorum* rate. In essence, an *ad valorum* freight bill of lading calls for the payment of an additional freight charge, usually 2% of the declared value, plus the regular freight rate (in this case $110.00 per LT) in the event the shipper desires to be covered for a value in excess of $500.00 per package.

The terms of the carrier's filed tariff as a matter of law are binding upon the shipper *Brown & Root, Inc. v. M/V Peisander* 648 F.2d 415, (5th Cir. 1981), and *Komatsu, Ltd. v. States Steamship Company* 674 F.2d 806, (9th Cir. 1982). The ordinary bill of lading becomes an *ad valorum* bill of lading only when the shipper declares the value and pays the additional *ad valorum* charge set forth in the carrier's tariff filed with the Federal Maritime Commission.

The Fifth Circuit Court of Appeals in *Wuerttembergische v. M/V Stuttgart Express*, 711 F.2 621, 622 (1983) held:

> ". . . we have firmly established the position in PEISANDER that the option need not be included on the face of the bill of lading, 648 F.2d at 425. Further, we concluded that the shipper carries the burden of proving that an opportunity for choice of evaluations and rates did not in fact exist. 648 F.2 at 424. As to the burden of proof issue, we are in agreement with the position of the United States Court of Appeals for the Second Circuit. Petition of Isbrandsten Co., 201 F.2d 281, 285 (2d Cir. 1953).
>
> Under COGSA the valuation per package was $500. The option to increase valuation by declaration and paying a higher freight was clear in the tariff which was in terms incorporated into the bill of lading. The option not having been expressed, the $500. per package limitation applies."

and

> "While the $500 per package minimum may be unrealistic in today's economy, the remedy must come from Congress. Until that occurs, an experienced shipper should not be permitted to gamble that no damage will occur, pay the customarily lower freight rates for goods of undeclared value, and then, when destruction in fact occurs, cry 'I did not know' and seek an exception to its own obligation 46 U.S. Code, sec. 1304(5)." (not officially reported). *La Seguridad v. Delta S.S* 1981 AMC 996, 1003. (SD Fla. 1980)

Thus, the Court below improperly concluded that the subject bill of lading was an *ad valorum* bill of lading despite any evidence in support thereof.

If shippers are reluctant to pay a higher rate and choose instead to gamble on safe delivery, they cannot argue later that the $500 package limitation of liability is inequitable *Trotter*, supra, at 1985 AMC 2789.

If the instant case is permitted to stand, this Court will in some future time be confronted with this issue. Succintly, if a shipper places a value on the face of a bill of lading without anything further, makes no declaration to the carrier that it is disclosing a value for the purpose of obtaining the carrier's unlimited liability and pays no higher freight rate, does the shipper unilaterally transform an ordinary bill of lading into an *ad valorum* bill of lading? This is the situation which bespeaks of judicial instruction in favor of this petitioner.

4. FOREIGN TORT LAW SHOULD APPLY

All of the events which took place in Brasil after completion of the carriage of goods should have been reviewed under the laws prevailing in the Federative Republic of Brasil. The Court below refused to consider the laws of Brasil despite the fact that the alleged acts of the defendant occurred there following completion of the ocean carriage. The Court of Appeals rejected evidence of Brasilian law that the carrier was not liable for misdelivery by the Port Authority or guilty of conversion since it did not have physical possession of the goods.

The Court stated at 775 F.2d 484:

> "It is surely obvious at this point that Lloyd's Brazilian law arguments are inapposite. The rights and obligations of the parties herein are rooted in United States Law. Both COGSA, 46 U.S.C. app. §1300, and the Harter Act, 46 U.S.C. app. §190, cover transactions involving carriage from ports in the United States to foreign ports."

It is primer law that the law of the place of the tort is controlling. In *Gordon v. Eastern Air Lines, Inc.*, 391 F.Supp. 31, 33 (SDNY 1975), the Court held:

> "More specifically, the New York Court of Appeals, in *Babcock v. Jackson*, supra, has carefully distinguished between those cases where the defendant's exercise of due care is in issue and those cases where the sole issue is the extent of plaintiff's recovery. In the former situation, the law of the state where the tort occurred controls.'
>
> 'In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place"

By its mistaken holding that the defendant remained liable as a bailee, the Second Circuit found it unnecessary to discuss foreign law. It is submitted that the Court erred in failing to do so.

CONCLUSION

The questions presented to this Court are of paramount importance to the shipping industry and the uniform application of the Carriage of Goods by Sea Act.

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

~~PLAINTIFF'S PROPOSED~~ *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

81 Civ 5643(RO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLIED CHEMICAL INTERNATIONAL CORP.
Plaintiff,

vs.

COMPANHIA DE NAVEGACAO Lloyd Brasileiro,
Defendant.

~~Plaintiff Allied Chemical International Corp., ("ALLIED")~~ RO ~~respectfully requested~~ The Court ~~to make the following~~ findings of facts and conclusions of law:*

FINDINGS OF FACT

1. Allied was and still is a corporation duly organized and existing under the laws of the State of Delaware and qualified to do business in the State of New York with offices and a place of business in the City, County and State of New York. It is engaged in the business of exporting chemical products manufactured by Allied Fibers and Plastics Co., a division of Allied Corporation, parent company of the plaintiff.

2. Defendant Companhia De Navegacao Lloyd Brasileiro ("Lloyd") was and still is a corporation organized under the laws of the Federative Republic of Brasil, with its principal place of business in Brasil, with an office and place of business in the City, County and State of New York. It is engaged in the business of an ocean common carrier of freight for hire, between ports in the United States and ports of Brasil, and in conducting said business, owned and operated the vessel "Itapura."

3. In September 1980, Allied received an order for a certain quantity of a product called caprolactam from a Brasilian company called Banylsa Tecelagem Do Brasil, S.A. ("Banylsa").

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* Editing marks made by District Court and reflect original document.

4. On October 20, 1980, at Norfolk, Virginia, pursuant to said order, Allied delivered to Lloyd 6,000 bags of caprolactam ("the Cargo") to be loaded and shipped aboard the Itapura to the Port of Salvador, Brasil.

5. Lloyd issued a clean Bill of Lading, describing the aforesaid cargo, showing Allied as the shipper, that the cargo was consigned to the order of Banylsa and describing Banylsa as the "notify party".

6. The invoice price for the sale of the said caprolactam from Allied to Banylsa was $266,756.92, C & F Salvador. The terms of sale were sight draft against documents through Banco Bamerindus Do Brasil S.A. of Sao Paulo, Brasil ("the Brasilian bank"). Allied, through its own bank, United Californi Bank International, forwarded the required shipping documents, including a sight draft, the original bill of lading and the original commercial invoice No. 866477 to the Brasilian bank for handling and collection.

7. The cargo was carried by Lloyd aboard the Itapura to Salvador, Brasil and on November 12, 1980, Lloyd discharged said cargo in the same good order and condition as shipped at a warehouse under the control of the Administration of the Port of Salvador, a Brasilian government agency ("the Port Authorities").

8. On November 17, 1980, Banylsa delivered to Lloyd a letter said to be in accordance with a Brasilian customs regulation, #040, requesting Lloyd to furnish a document to Banylsa described as a "carta declaratoria" (in English, a "letter of declaration"), attesting that the freight and a merchant marine tax have been paid. On the same date, and in response to said letter, Lloyd delivered such a document to Banylsa, stating also that Lloyd does not object to the customs clearance of said cargo.

9. After obtaining said "carta declaratoria", and presumably after complying with other customs and port formalities, Banylsa obtained possession of said cargo from the Port authorities.

10. Banylsa did not pay the Brasilian bank or Allied the sum of $266,756.92 as provided for in the sight draft, did not obtain the original bill of lading from the Brasilian bank and did not surrender the original bill of lading to Lloyd or to anyone else.

11. After Banylsa obtained possession of the caprolactum, Banylsa used it in the manufacture of its yarn product, and then on or about January 26, 1981, made a complaint to Allied that the caprolactam was of inferior quality and demanded a credit. This was the first time that Allied became aware that Banylsa had obtained possession of the said cargo without paying the sight draft. Allied thereupon investigated and rejected Banylsa's claim and meanwhile was also investigating the circumstances surrounding Banylsa's obtaining possession of the cargo without making payment therefor. Indeed, Lloyd investigated and during that investigation, acknowledged that – it had acted improperly in releasing the goods without its surrender of the original Bill of Lading.**

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12. In due course, the original bill of lading and unpaid sight draft were returned by the Brasilian bank to Allied, who is in present possession thereof.

13. On April 3, 1981, Banylsa filed a voluntary proceeding in a Brasilian Court to obtain relief from its debts. On May 8, 1981, Allied made claim against Lloyd for the improper release of the cargo, but Lloyd refused to pay and Allied then instituted this suit on September 10, 1981. On May 20, 1981, Allied filed claim against Banylsa in the Brasilian Court proceeding in regard to this shipment and two other shipments on another vessel with another ocean carrier. Having taken steps to regain possession of the other two shipments from the Port authorities, which was eventually accomplished, Allied filed an amended claim on May 29, 1981 in the Banylsa proceeding in the sum of $266,756.92, the same amount as sued for herein.

14. On September 2, 1983, Banylsa deposited with the Brasilian Court 20,414,907 Cruzeiros for Allied's first and final distributive share in the receivership proceeding, based or Allied's claim of U.S. $266,756.92 at the exchange rate of 76.53 Cruzeiros to U.S. $1.00 in effect when Banylsa filed its petition on April 3, 1981. Allied's position was that it was entitled to 178,993,872.22

** Handwritten insert by District Court.

Cruzeiros based on the rate of 671 Cruzeiros to U.S. $1.00 in effect on the date of Banylsa's deposit, together with interest, but the Court rejected Allied's claim, approved Banylsa's deposit and terminated the proceeding. Allied filed an appeal to this ruling, claiming interest and additional Cruzeiros based on the current rate of exchange, but then withdrew the appeal upon receipt from Banylsa directly of a sum of money for interest and upon advice of counsel that its demand for additional Cruzeiros would be of no avail on the appeal and would tie up the principal for about three to four years. Accordingly, Allied received the following sums:

> 20,414,907 Cruzeiros equal to U.S. $30,424.60 (Principal) as of September 2, 1983
>
> 5,920,350 Cruzeiros equal to U.S. $8,823.17 (Interest as of September 2, 1983

15. After this suit was instituted, Allied kept Lloyd advised at various times during the Banylsa proceedings of settlement proposals which never materialized and of its intention to take its first and final distributive share, always reserving its rights against Lloyd, and while Lloyd never specifically consented or objected to Allied's efforts, it did acquiesce thereto.

16. On April 2, 1981, Allied's Brasilian attorney, with Allied's consent, released the original commercial invoice to Banylsa covering the said cargo, and on April 8, 1981, Banylsa surrendered the said invoice to Brasilian Customs authorities. In releasing the invoice to Banylsa, Allied's Brasilian attorney stated that it was being released for the sole purpose of Banylsa's avoiding a penalty due to Banylsa's not presenting said invoice as per an instrument assuming responsibility filed with Brasilian Customs in order to obtain possession of the cargo.

17. Allied performed its part of the contract of sale with Banylsa and there is no evidence that the caprolactam was of inferior quality.

18. Lloyd's long-form bill of lading, incorporated by reference into the short form bill of lading, provides *inter alia*, that:

(a) the bill of lading shall be construed and the rights of the parties thereunder determined according to the laws of the United States;

(b) the bill of lading shall be subject to the provisions of the U.S. Carriage of Goods by Sea Act ("COGSA"), which shall govern before goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier.

(c) The carrier shall not be liable for mis-delivery while the goods are not in the actual custody of the carrier.

(d) The responsibility of the carrier shall cease and the goods shall be deemed delivered when taken into the custody of customs or other authorities.

(e) The carrier shall not be liable for any loss in an amount exceeding $500 per package unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading and extra freight paid.

19. While the limitation of $500 per package is set forth in Lloyd's long form bill of lading, that specific defense was not pleaded by Lloyd in its answer. Lloyd pleads two general defenses, its "Second" alleging that delivery was made in accordance with Lloyd's long form bill of lading, and its "Third", alleging delivery in accordance with COGSA.

20. The bill of lading itself describes the cargo as "150 double faced pallets said to contain 6000 bags caprolactum. In the only correspondence between the parties before the commencement of this action, there is no reference to the number of packages nor did Lloyd ever claim the package limitation or even refer to it on its motion to dismiss on the grounds of *forum non convenience* previously before this Court, until it surfaced at a pretrial conference on September 22, 1983, when Lloyd raised it for

the first time. Allied characterized the shipment in its commercial invoice to Banylsa as "6000 packages. In the "carta declaratoria", Lloyd characterized the shipment as 150 pallets containing 6000 bags of caprolactam.

21. The bill of lading specifically declares the nature of the goods (caprolactam) and the value thereof to be $1,657 per long ton. A long ton is equivalent to 2240 pounds. According to Lloyd's tariff, if the value does not exceed $2,000 per 2240 pounds, the rate is $110 per ton, which is the rate actually charged by Lloyd. Neither Lloyd's tariff nor its bill of lading provide for any additional freight in the event of a declaration of value in excess of $500 per package.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of the action in admiralty, or alternatively, by virtue of diversity of citizenship and that the matter in controversy exceeds $10,000.00.

2. Allied, as the shipper in the bill of lading and thereby being a party to the contract of carriage, and being in possession of the original bill of lading in the same form as issued, is the real party in interest and has standing to bring this action.

3. This case is governed by United States law, not only of virtue of express provisions of various United States Statutes, 49 U.S.C. §81, 46 U.S.C. §190, 46 U.S.C. §1300 that so provide, but also by virtue of the express terms of the bill of lading and United States maritime law.

4. Under United States law, Lloyd's obligation under the contract of carriage with Allied was to deliver the cargo to the order of Banylsa, but only on the presentation by Banylsa of the original bill of lading duly endorsed by Banylsa, which Banylsa failed to do. Brasilian law imposes the same obligation on the carrier. Lloyd acknowledged this, and it is the only way these transactions--and there were three of them--could realistically go to completion.** RO

5. By releasing the cargo to Banylsa without obtaining the original bill of lading, Lloyd, as a common carrier, was absolutely liable to Allied for any loss Allied sustained by reason of the improper delivery, either for breach of contract or in conversion.

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6. Lloyd cannot exonerate itself from such misdelivery by shifting responsibility to the Brasilian Port authorities with whom Lloyd deposited the cargo, for the reason that it was Lloyd own act of giving Banylsa a "carta declaratoria", amounting to a release of Lloyd's control over the cargo, that enabled Banylsa to obtain possession from the Brasilian Port authorities without production of the original bill of lading. If Lloyd had not issued the "carta declaratoria", Banylsa could not have obtained possession of the cargo unless it obtained a court order.

7. Nor is there anything in Lloyd's bill of lading, which is a contract of adhesion, or in Brasilian law or the custom at the Port, that excuses Lloyd for the misdelivery, when Lloyd itself brought the misdelivery about by its own act.

8. Lloyd not only did not follow the laws, regulations or customs of Brasil as to the release of cargo, but it also failed to adhere to its own Service Manual. It not only failed to obtain the original bill of lading, but it also failed to take any of the diligent steps for its own protection when the original is not submitted, as in a case where the bill is lost has disappeared, such as getting in touch with the shipper, publishing notices in a newspaper, seeking a Court judgment, obtaining an instrument from the consignee or its agent assuming responsibility, or obtaining a guaranty from a bank. Not having taken any of these steps, it is unnecessary for the Court to pass judgment on the legal consequences if it had.

9. Those Brasilian laws, provisions of the bill of lading, or United States Court decisions that may relieve the carrier of liability for cargo damage, shortages, physical loss or disappearance, occurring while the goods are in the custody of the Port authorities at the port of destination, are inapplicable to the case at bar.

10. Any efforts by Allied to recover from Banylsa, the person to whom the cargo was wrongfully delivered, or the delivery of the original commercial invoice to Banylsa for the sole purpose of enabling Banylsa to avoid a Brasilian customs penalty, at a time when Allied was trying to recover two other shipments from the Port authorities, did not constitute a waiver of Allied's rights

to recover against Lloyd, but the sums actually received by Allied from the Banylsa Court proceeding shall be applied in mitigation of damages.

11. The $500 package limitation in the bill of lading was not pleaded by Lloyd and was only raised two years after this suit was instituted and is not a defense now available to Lloyd.

12. In any event, based on the terms of the bill of lading, clearly setting forth the number of bags in each pallet, and the negotiations between the parties, Allied's commercial invoice and Lloyd's carta declaratoria, and because of the long delay by Lloyd in raising this defense, the parties intended that the package be each bag of caprolactam, rather than each pallet.

13. Moreover, Allied declared the nature and value of the cargo in the bill of lading, and there is no proof of any kind that Lloyd offered a choice of rates in its tariff or otherwise for purposes of the package limitation.

14. Allied paid Lloyd the agreed freight charge for delivery of the cargo, but Lloyd misdelivered the cargo in violation of its contractual obligation to Allied, and accordingly, Allied is entitled to recover the sum of $266,756.92, less the sum of $30,424.60 recovered from the Banylsa proceeding or the net sum of $236,332.32, plus interest from November 17, 1980, with Allied to give Lloyd a credit in its judgment for interest received from
RO the Banylsa proceeding in the sum of $8,823.17, together with costs and disbursements to be taxed by the clerk.**

15. Lloyd has failed to sustain its burden of proof on any of its other affirmative defenses, and accordingly, all of Lloyd's affirmative defenses are dismissed.

RO 16. Submit judgment accordingly on notice.*

/s/ R. Owen **
USDJ

January 18, 1985
Dated: ~~June 28, 1984~~

/s/ Irving Ronald Storch*
IRVING RONALD STORCH
Attorney for Plaintiff
Office & P.O. Address
One Old Country Road
Carle Place, N.Y. 11514
(516) 294-8160

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APPENDIX B

81 Civ 5643(RO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLIED CHEMICAL INTERNATIONAL CORP.
Plaintiff,

vs.

COMPANHIA DE NAVEGACAO Lloyd Brasileiro,
Defendant.

JUDGMENT

NO. 82,0206

This cause came on to be heard on the consent of the parties by the submission of the case to the Honorable Richard Owen on stipulations as to facts, the deposition of a witness, memoranda of law and an appendix, and the Court having decided that plaintiff is entitled to judgment herein in accordance with its findings of fact and conclusions of law dated January 18, 1985, it is hereby

ORDERED, ADJUDGED, AND DECREED that plaintiff ALLIED CHEMICAL INTERNATIONAL CORP., of 1411 Broadway, New York, New York recover from defendant COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, of 17 Battery Place, New York, New York the sum of $236,332.32 (after giving defendant a credit of $30,424.60), plus $88,308.92 as prejudgment interest from November 17, 1980 (after giving defendant a credit of $8,823.17), for a total of $324,641.24, plus interest on such sum after judgment at the rate of 9.09 percent (%) per annum from the date hereof, plus all costs and disbursements as taxed by the Clerk of the Court.

/s/ R. Owen
U.S.D.J.

Dated: New York, New York
January 20, 1985

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON FEBRUARY 5, 1985

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1125—August Term, 1984

(Argued May 8, 1985 Decided October 15, 1985)

Docket No. 85-7103

ALLIED CHEMICAL INTERNATIONAL CORP.,

Plaintiff-Appellee,

—v.—

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Defendant-Appellant.

Before:

MESKILL, KEARSE and WINTER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Owen, *J.*, finding Companhia de Navegacao Lloyd Brasileiro, an ocean carrier, liable to Allied Chemical International Corporation, a shipper, for misdelivery. Concluding that

the Carriage of Goods by Sea Act package limitation, 46 U.S.C. app. § 1304(5) (Supp. I 1983), incorporated into the bill of lading, did not reduce the carrier's liability, the court held that the shipper was entitled to recover the full value of the cargo.

Affirmed.

RICHARD A. HAGEN, New York City (Francis R. Matera, Crowell, Rouse, Varian, Hagen & Matera, New York City, of counsel), *for Defendant-Appellant*.

IRVING RONALD STORCH, Carle Place, New York, *for Plaintiff-Appellee*.

MESKILL, *Circuit Judge*:

Companhia de Navegacao Lloyd Brasileiro (Lloyd), an ocean carrier, appeals from a judgment of the United States District Court for the Southern District of New York, Owen, *J.*, finding Lloyd liable to Allied Chemical International Corporation (Allied), a shipper, for the misdelivery of goods to the consignee, Banylsa Tecelagem do Brasil S.A. (Banylsa). The carrier caused the goods to be delivered without requiring Banylsa to produce the original order bill of lading. Lloyd also challenges the district court's refusal to interpret the Carriage of Goods by Sea Act (COGSA) package limitation, 46 U.S.C. app.

§ 1304(5) (Supp. I 1983), which was incorporated into the bill of lading, to reduce Allied's recovery. The court awarded damages equal to the value of the cargo in United States dollars minus an amount that Allied had already recovered from Banylsa plus interest.

We affirm the judgment of the district court.

BACKGROUND

This case was decided without a trial. The parties submitted to the district court two stipulations of fact; the deposition of Pedro Calmon Filho, an expert on Brazilian law; memoranda, one of which included an appendix; and separate proposed findings of fact and conclusions of law. Allied alleged federal jurisdiction on the basis of admiralty or, alternatively, diversity of citizenship. The pertinent, undisputed facts follow.

In September 1980, Allied, an exporter of chemical products, received from Banylsa an order for a quantity of caprolactam, a crystalline cyclic amide used in the manufacture of nylon. The sale was to be in two lots of 6,000 bags on terms of sight drafts against documents through Banco Bamerindus do Brasil S.A. of Sao Paulo, Brazil (Brazilian bank). The sight drafts were in the amount of the per lot invoice price, $266,756.92 C & F Salvador, Brazil.

In October 1980, Allied delivered to Lloyd at the Port of Norfolk, Virginia two lots of 150 double faced pallets, each lot said to contain 6,000 bags of caprolactam to be shipped to the Port of Salvador, Brazil. The cargo was loaded onto Lloyd's vessel ITAPURA. Lloyd issued clean

order bills of lading that described the cargo, listed Allied as the shipper and showed that the goods were consigned to the order of Banylsa. Banylsa was also listed as the notify party. Allied, through its bank, forwarded the shipping documents—including the sight drafts, the original bills of lading and the original commercial invoices—to the Brazilian bank for handling and collection. Allied specifically instructed the Brazilian bank to deliver the documents only against payment of the sight drafts.

On or about November 12, 1980, Lloyd's vessel arrived at the Port of Salvador. In accordance with local custom and usage, the carrier unloaded the caprolactam at a warehouse under the control of the Administration of the Port of Salvador (the port authority), an agency of the Brazilian government. The caprolactam was undamaged.

Banylsa made payment on only one of the two sight drafts and therefore received from the Brazilian bank only one bill of lading. It is the bill of lading not received and the lot to which it related that are the subject of this dispute. Hereinafter, when we refer to the cargo or to the bill of lading, we refer solely to the misdelivered goods and the bill of lading that covered them.

On November 17, 1980, Banylsa through its agent delivered to Lloyd's agent in Salvador a letter explaining simply that the original bill of lading had not been received and requesting Lloyd to issue in accordance with Brazilian import regulations a "carta declaratoria," a letter declaring that the freight had been paid at the port of origin and that the Merchant Marine Renewal Tax had been paid in Salvador.[1] That same day, Lloyd's agent

---

[1] The body of the letter sent by Banylsa's agent to Lloyd's agent provided as follows:

issued the requested document.[2] The parties do not dispute that to obtain the release of goods from the port authority, a party would have to produce either the original bill of lading or a carta declaratoria from the carrier. Thus, by virtue of the carta declaratoria, Banylsa was able to obtain possession of the caprolactam although it had not paid for the goods and it was not in possession of the bill of lading.

Allied first became aware that the sight draft had not been paid in January 1981. It was not until several weeks later, however, when Banylsa complained about the quality of the caprolactam, that Allied discovered that Banylsa had, notwithstanding nonpayment, obtained possession of the caprolactam. After an investigation that

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> With reference to Bill of Lading No. 2—Norfolk/Salvador of steamship "Itapura" V. 80148.2 arrived at this port on November 11, 1980, due to the fact that the Original Bill of Lading up to to [sic] the present date has not been received and in compliance with our client (Banylsa Tecelagem do Brasil S.A.)'s request, the said Bill of Lading being consigned to the order of the latter, for the purpose of [customs clearance regulations], we beg hereby your being kind enough to supply a "carta declaratoria" that the freight has been paid at the port of origin and that the T.R.M.M. payment was made here.
>
> J. App. at 27.

[2] The body of the carta declaratoria issued by Lloyd's agent stated as follows:

> Vessel "ITAPURA" arrived on 11/11/1980—150 pallets, marked "BANYLSA-ARATU-VIA SALVADOR BA 473 FIB 8766 WEIGHT 158,876 kgs. containing 6,000 bags of caprolactam consigned to Banylsa Tecelagem do Brasil S.A."
>
> For the purpose of [customs clearance regulations], we state that we do not object to the customs clearance of the cargo referred to above, since the freight and the Merchant Marine Renewal Tax have already been paid.
>
> J. App. at 28.

included an on-site inspection of the goods at Banylsa's facility, Allied rejected Banylsa's quality complaint.

In early April 1981, Banylsa filed a voluntary receivership proceeding in the Civil Court of the District of Salvador, Brazil. On May 8, 1981, Allied made a demand on Lloyd for losses incurred as a result of the carrier's failure to request proper documentation before authorizing the release of the caprolactam. J. App. at 160. The demand letter stated that Allied had been advised by Lloyd that the goods were released on Banylsa's promise to deliver the original bill of lading within 90 days. *Id.* Negotiations between the shipper and the carrier proved unavailing and Allied filed this suit in September 1981.

In May 1981, Allied filed a claim against Banylsa in the receivership proceeding. In September 1983, Banylsa deposited with the Salvador court 20,414,907 cruzeiros to pay Allied's share of the receivership distribution. The amount was equal to Allied's claim in United States dollars at the exchange rate of 76.53 cruzeiros to the dollar, the rate in effect when Banylsa filed its petition. Allied argued that it was entitled to payment at the rate in effect on the date of Banylsa's deposit, 671 cruzeiros to the dollar. On advice of counsel, Allied abandoned its appeal and accepted a sum in cruzeiros equal to less than $40,000 as of September 1983.

In its complaint against Lloyd, Allied charged that the ocean carrier had breached its contract of carriage with Allied. It also claimed that Lloyd was liable for conversion of the cargo because Lloyd authorized the delivery of the cargo to a party not entitled to possession. The district judge decided in Allied's favor and adopted Allied's proposed findings of fact and conclusions of law

virtually verbatim. The findings and conclusions cited no cases and contained not a single reference to the brief but adequate record.

On appeal, Lloyd preliminarily argues that because the district court decided this case on submission and because the court simply adopted the prevailing party's proposed findings verbatim, our review should not be limited by the clearly erroneous standard but should be *de novo*. On the issue of liability, Lloyd raises four challenges. First, it claims that it fully discharged its responsibility under the contract of carriage when it delivered the cargo as dictated by local custom and usage to the government controlled port authority. Second, Lloyd claims that it cannot be liable for conversion either because that would be contrary to Brazilian law or because the rights and liabilities under COGSA, 46 U.S.C. app. § 1300 *et seq.* (Supp. I 1983), are exclusive. Third and fourth, Lloyd raises related arguments, payment and waiver, based on Allied's claim and partial recovery against Banylsa in the receivership proceeding. Finally, Lloyd contends that even if it is liable, the COGSA package limitation, incorporated into the bill of lading, should reduce Allied's recovery to $500 per pallet or $75,000. For the reasons that follow, we reject Lloyd's arguments.

DISCUSSION

A. *The Scope of Review*

The Supreme Court recently and unequivocally rejected the standard of review that Lloyd urges us to employ. In *Anderson* v. *City of Bessemer City*, 53 U.S.L.W. 4314, 4315 (U.S. Mar. 19, 1985), the Court reversed a Fourth Circuit decision on the ground that the appeals court

"misapprehended and misapplied the clearly-erroneous standard." The circuit court had reasoned that an essentially *de novo* review of the record was justified because the district court had adopted, albeit with some variation, the prevailing party's proposed findings of facts. The Supreme Court adamantly disagreed. Emphasizing that "review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception," *id.* at 4317, the Court explained that neither findings based on documentary evidence and thus largely devoid of credibility considerations, *id.*, nor findings adopted verbatim from a party's proposals may be subjected to a more stringent standard of review. *Id.* at 4316.

We certainly do not wish to in any way condone the verbatim adoption of proposed findings of fact. While recognizing the time pressures on district court judges, we have expressed our displeasure with this procedure in the past. *E.g.*, *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1341 n.6 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974). In this we are not alone. *E.g.*, *Bessemer City*, 53 U.S.L.W. at 4316; *United States* v. *Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). Nonetheless, we are bound to uphold the findings of the court below unless, on the basis of the entire record, we are convinced that they are clearly erroneous. We are not persuaded that the findings below fall short of this familiar benchmark. We therefore leave them undisturbed.

B. *Jurisdiction and Governing Law*

This suit involves claims by a shipper against an ocean carrier arising from an alleged breach of a contract of carriage. Thus it lies within our admiralty jurisdiction. *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 807 (2d Cir. 1971); *David Crystal, Inc.* v. *Cunard Steam-Ship Co.*, 339 F.2d 295, 298 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *see* 28 U.S.C. § 1333(1) (1982). Consequently, this action is governed by federal maritime law.

C. *Liability*

The liability question in this case inextricably involves the critical importance of the documentary transaction in overseas trade. *See generally* G. Gilmore & C. Black, The Law of Admiralty 110-12 (2d ed. 1975). The documentary sale enables the distant seller to protect himself from an insolvent or fraudulent foreign buyer by ensuring that the buyer ordinarily cannot take possession of the goods until he has paid for them. It accomplishes this rather simply. The seller tenders shipping documents, including a negotiable bill of lading, rather than goods to the buyer. By paying for the documents, the buyer gets possession of the original bill of lading. Possession of the bill entitles him to possession of the goods; it represents the goods and conveys title to them. Most likely, the bill will be an order bill of lading, made to the order of or endorsed to the buyer. *See id.* at 96-97. Absent a valid agreement to the contrary, the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading. "Delivery to the consignee named in the bill of lading does not suffice to discharge the [carrier] where the consignee does not hold

the bill of lading." 2 T.G. Carver, Carriage by Sea ¶ 1593 (R. Colinvaux 13th ed. 1982). If the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery. *David Crystal*, 339 F.2d at 300; *Morse Electro Products Corp.* v. *S.S. Great Peace*, 437 F.Supp. 474, 482 (D.N.J. 1977); *The Cabo Villano*, 14 F.2d 978 (E.D.N.Y. 1926), *modified as to damages*, 18 F.2d 220 (2d Cir. 1927). The ocean carrier's liability arises from rights of property, 1 T.G. Carver, *supra*, at ¶ 120, and "[d]elivery to a person not entitled to the goods without production of the bill of lading is prima facie a conversion of the goods and a breach of contract." 2 *id.* at ¶ 1593 (footnotes omitted).

The dispute herein involved precisely the consequence that the documentary transaction is intended to avert: Banylsa, which turned out to be an insolvent buyer, was given possession of goods for which it had not paid. This result would have been avoided had Lloyd, in keeping with its obligation, demanded the production of the bill of lading before permitting Banylsa to claim the caprolactam.

Before we can hold Lloyd liable for causing Allied's loss, however, we must examine the respective rights and obligations of the parties at the time of the apparent misdelivery to determine whether Lloyd was somehow relieved of its duty to take up the bill of lading. Although the cargo had been discharged from the ship and, thus, the actual carriage completed when the apparent misdelivery occurred, the relationship between Allied and Lloyd was still governed by the contract of carriage. *See Leather's Best*, 451 F.2d at 807. Our analysis begins with the bill of lading, the document evidencing the contract of carriage. *David Crystal*, 339 F.2d at 297. We bear in mind

that bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier. *The Caledonia*, 157 U.S. 124, 137 (1895); *West India Industries* v. *Tradex*, 664 F.2d 946, 951 n.9 (5th Cir. 1981); *Mitsui & Co.* v. *American Export Lines*, 636 F.2d 807, 822-23 (2d Cir. 1981); *E. Gerli & Co.* v. *Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931) (L. Hand, *J.*).

Lloyd contends that clauses 1 and 12 of the bill of lading absolve it from liability. Clause 1 provides that "[t]he Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier." J. App. at 32. Clause 12 provides that "[t]he responsibility of the Carrier, in any capacity, shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities." J. App. at 34.

Lloyd's reliance on these clauses is unavailing because they are null and void. In *David Crystal*, 339 F.2d at 297, we held clauses similar to 1 and 12 to be invalid under the Harter Act's proscriptions against certain limitations on carriers' liability. *See* 46 U.S.C. app. § 190 (Supp. I 1983). Although the enactment of COGSA sharply curtailed the applicability of the Harter Act, 46 U.S.C. app. § 190 *et seq.* (Supp. I 1983), to ocean bills of lading and matters of ocean carriers' liability, absent a valid agreement to the contrary, the Harter Act still governs prior to loading and after discharge of cargo until proper delivery is made.[3] *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*,

[3] Where goods are shipped under an order bill of lading, it would seem logical to include in any definition of proper delivery the fulfillment of the carrier's duty to ensure, absent specific agreement to the contrary, that the cargo is released to the holder of the properly endorsed bill.

318 F.2d 720, 722-23 (2d Cir.), *cert. denied*, 375 U.S. 942 (1963); G. Gilmore & C. Black, *supra*, at 147-48. While a carrier and a shipper may specify by agreement what the responsibility of the carrier should be after the goods are discharged, the carrier may not simply disclaim all post-discharge responsibility. *Leather's Best*, 451 F.2d at 807 n.5.

Insofar as Lloyd relies on these clauses as agreements not to eliminate but merely to reduce its liability, which would be permissible under the Harter Act, its arguments are unavailing because the district court found that the parties did not intend the clauses to have that effect. It is undisputed that the parties agreed that COGSA, which by its terms does not apply either before loading or after discharge of cargo, 46 U.S.C. app. § 1311, was to govern before the goods were loaded and after they were discharged from the ship. This was a permissible agreement, *see Colgate Palmolive Co.* v. *S/S Dart Canada*, 724 F.2d 313, 315 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3791 (U.S. Apr. 30, 1984), and made COGSA "apply [not] of its own force as a statute, but merely as a contractual term in the bill of lading."[4] *Id.* Because COGSA § 1303(8) provides that the parties may not, except as otherwise provided by COGSA (see our discussion below), agree even to lessen the carrier's liability for loss arising from its own negligence or fault, and COGSA was incorporated into the bill of lading, the court's finding that clauses 1 and 12 of the bill of lading did not lessen Lloyd's liability for its negligent misdelivery is not clearly erroneous.

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[4] We reject Lloyd's argument that COGSA's remedies are exclusive under these circumstances. The wholesale incorporation into the bill of lading of COGSA's terms does not suffice to extinguish the shipper's right of action for misdelivery. We are particularly loath to liberally construe general language in a contract of adhesion to the obvious advantage of the drafting party.

While it is clear, then, that Lloyd retained some responsibilities after discharge, the bill of lading did not specify what they might be. Therefore, "the law steps in to fill the lacuna" and provides that when Lloyd discharged the cargo, it assumed the status of a bailee. *David Crystal*, 339 F.2d at 298; *Leather's Best*, 451 F.2d at 811-12. The transfer of the cargo to the port authority, without more, did not alter this status; thus Lloyd remained presumptively responsible for the proper delivery of the goods. *Leather's Best*, 451 F.2d at 812; *David Crystal*, 339 F.2d at 298. We have previously articulated the applicable standard of responsibility under admiralty law: "a bailee is absolutely liable for misdelivering cargo, unless his mistake as to the person entitled to receive the goods was induced by the bailor" or the contract of carriage otherwise reduced or eliminated his liability. *David Crystal*, 339 F.2d at 298. There is no suggestion in the record that Allied induced the misdelivery. Allied was not even aware until well after the event that Banylsa had acquired possession of the goods. We have already noted that the parties could not lawfully agree to eliminate Lloyd's liability entirely and have upheld the district court's finding that they did not intend that clauses 1 and 12 would lessen Lloyd's liability for negligent misdelivery.

The remaining question is whether the parties intended, by their incorporation of COGSA, that any provision of COGSA itself would lessen Lloyd's liability for negligent misdelivery. One important consequence of the enactment of COGSA was the elimination of absolute liability of carriers. Under COGSA, carriers can be liable for loss of or damage to cargo only on the basis of fault. G. Gilmore & C. Black, *supra*, at 150. After describing a number of specific duties, the statute provides somewhat generally,

in language that seems relevant to this case, that the carrier shall not be liable for losses resulting from

> [a]ny . . . cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

46 U.S.C. app. § 1304(2)(q).

Unfortunately for Lloyd, however, this provision seems to support rather than undermine the imposition of liability for the misdelivery. COGSA specifically left unaffected the applicability of the Pomerene Bills of Lading Act, 49 U.S.C. app. § 81 *et seq.* (1982), to ocean bills of lading. Pursuant to the Pomerene Act, a carrier operating under an order bill of lading is justified in delivering the goods to one lawfully entitled to them or to one in possession of an order bill "by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee." 49 U.S.C. app. § 89. When Lloyd caused the goods to be released to Banylsa, by means of the carta declaratoria, the bill of lading was still in the custody of the Brazilian bank because payment had not been made on the sight draft. Not having paid on the draft, Banylsa was neither lawfully entitled to the goods nor in possession of the bill. Delivery to Banylsa, therefore, was not justified. In light of its unjustified authorization of the delivery, Lloyd could not possibly show, as required by section 1304(2)(q) of COGSA, that it did not by its actual fault contribute to Allied's loss.

Having found nothing in the contract of carriage that eliminates or reduces the carrier's duty to deliver the cargo only to a party in possession of the bill of lading paid to his order or properly endorsed, we conclude that the district court correctly determined that Lloyd should be liable for the loss that resulted from its misdelivery. *See* 49 U.S.C. app. § 90; *see also Pere Marquette Ry.* v. *J.F. French & Co.*, 254 U.S. 538, 546 (1921); *Alderman Brothers Co.* v. *New York, N.H. & H.R.R.*, 102 Conn. 461, 465 (1925).

The fact that the government controlled port authority, rather than Lloyd itself, physically delivered the goods to Banylsa does not in any way relieve Lloyd from liability. As previously noted, it is undisputed that unless Banylsa presented to the port authority either the original bill of lading or a carta declaratoria issued by the carrier, the port authority would not have permitted Banylsa to take the cargo. Because Banylsa did not pay the sight draft and take possession of the bill of lading, Lloyd retained control over the goods. Thus, Lloyd acted at its peril when it authorized the release of the goods to Banylsa without demanding production of the bill. *The Cabo Villano*, 14 F.2d at 979-81.

It is surely obvious at this point that Lloyd's Brazilian law arguments are inapposite. The rights and obligations of the parties herein are rooted in United States law. Both COGSA, 46 U.S.C. app. § 1300, and the Harter Act, 46 U.S.C. app. § 190, cover transactions involving carriage from ports in the United States to foreign ports. Moreover, Lloyd's own bill of lading provided that it should "be construed and the rights of the parties thereunder determined according to the law of the United States." J. App. at 34.

Finally, Allied's claim and partial recovery against Banylsa in the receivership proceeding did not extinguish Allied's right of action against Lloyd. By misdelivering the caprolactam to Banylsa, Lloyd was responsible for Allied's loss. Allied is entitled to be compensated for the full amount of its loss in United States dollars. Of course, the amount that Allied has already recovered from Banylsa must be considered in mitigation of the damages that Lloyd must pay.[5]

D. *Damages*

Citing both COGSA and clause 17 of the bill of lading, Lloyd claims that its liability is limited to $500 per pallet or $75,000 ($500 × 150 pallets). Section 1304(5) of COGSA, which Lloyd argues is applicable through the express extension of COGSA contained in the bill of lading, provides in pertinent part that the carrier shall not be liable for loss of or damage to cargo in an amount greater than $500 per package "unless the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier." Clause 17 of the bill of lading provides in relevant part that the carrier's liability for damages shall be identically limited "unless the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the Bill of Lading and extra freight paid." J. App. at 34. The parties apparently agree that the term "package" has the same meaning in COGSA and clause

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5 We express no opinion at this time as to whether the entire prior recovery would be similarly considered to mitigate the award against a carrier who can successfully claim a statutory or contractual limitation on damages.

17. We therefore need not on that ground distinguish between the COGSA and the clause 17 limitations.

Allied maintains that the district court properly refused to limit damages because Lloyd failed to plead the limitation as a special defense and never moved to amend its answer to include the defense. Our Circuit has never addressed whether a partial limitation is waived if not pleaded as a special defense. We need not decide it here because Allied also argues that the district court was correct because the pallets should not be considered to be the packages. Therefore, Allied claims, the limitation is irrelevant. We agree.

The question of what constitutes a COGSA package, a question we frequently confront, is largely and in the first instance a matter of contract interpretation. *Allied International American Eagle Trading Corp.* v. *S.S. "Yang Ming,"* 672 F.2d 1055, 1057, 1061 (2d Cir. 1982); *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft*, 375 F.2d 943, 946 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). The most obvious place for us to begin our search for the intent of the contracting parties is, of course, the bill of lading. *Binladen BSB Landscaping* v. *M.V. "Nedlloyd Rotterdam,"* 759 F.2d 1006, 1012 (2d Cir. 1985). The bill of lading herein contained six columns under the usual general heading, "Particulars Furnished by Shipper." Only two of those columns and only a few of the items appearing in those columns are important to our decision. The first column, headed "No. of Pkgs.," contained the entry "150." Immediately to the right of that number, squarely in the column labeled "Description of Packages and Goods," was entered "Double Faced Pallets Said to Contain: 6000 Bags Caprolactum [sic]." Just above this

entry, in the same column, it stated "Rate: $110.00 LT Value: $1657.00 LT." The abbreviation LT stands for long ton, the equivalent of 2,240 pounds.

We have long accepted that a pallet may, under appropriate circumstances, be deemed to be a package. *Yang Ming*, 672 F.2d at 1062; *Standard Electrica*, 375 F.2d at 946. This may be so even where the containers on the pallet themselves constitute ordinary commercial units. Moreover, in *Yang Ming* we ruled that where, as here, the shipper gives written notice in the bill of the number of containers on the pallets, the carrier is not necessarily bound to that number if the bill elsewhere lists the number of pallets as the number of packages. *Yang Ming*, 672 F.2d at 1061. Thus the bill of lading could support either the shipper's or the carrier's position; it is not determinative. We do note, however, that in *Yang Ming*, the number of pallets was declared several times in the bill of lading to be the number of packages. *Id.* at 1063. We therefore were reasonably certain that the parties intended the pallets to constitute packages for limitations purposes. Here, however, the number of pallets was listed but once—as was the number of bags. Looking only at the numbers, we would conclude that the parties' intent is ambiguous.

But the bill contains another and potentially more significant entry—the freight charge—which we believe indicates that the parties did not intend the pallets to be packages. Lloyd contends that it would have charged a higher rate if it was potentially liable for the full value of the goods. Indeed, clause 17 explicitly and COGSA implicitly "cast upon the shipper the burden of declaring the nature and value of the goods, and paying a higher

tariff, if necessary, [in order to] impose a higher liability upon the carrier." *Standard Electrica*, 375 F.2d at 945.

The excerpts cited from the bill of lading show that Allied adequately met its burden to declare the nature and value of the goods. And, despite Lloyd's attempts to introduce new evidence at this stage, we are limited to the record, and the record clearly shows that the freight rate was based on the value of the goods. Caprolactam valued at less than $2,000 per long ton was charged a rate of $110 per long ton. J. App. at 165. More valuable caprolactam was charged a rate of $131.50 per long ton. *Id.* Thus, under the applicable tariff, Allied had no option to pay a higher rate. Having paid a freight charge based on the value of the goods, Allied could reasonably have expected to recover their value if they were lost. Similarly, having levied a rate keyed to value, Lloyd could reasonably have expected to be liable for that value. It would be illogical to ascribe a contrary intent to the parties.

As a final point, we reiterate that ocean bills of lading are contracts of adhesion. Ambiguities, therefore, must be resolved against the issuing carrier. *Mitsui & Co.* v. *American Export Lines*, 636 F.2d at 822-23. We conclude that the district court's finding that the parties did not intend the pallets to be packages was not clearly erroneous. Therefore, we affirm the district court's award of damages.

CONCLUSION

The judgment of the district court is affirmed. Appellant is liable for costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of November one thousand nine hundred and eighty-five.

Docket No. 85-7103

ALLIED CHEMICAL INTERNATIONAL CORP.,

Plaintiff-Appellee,

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant, Companhia De Navegacao Lloyd Brasileiro

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

Supreme Court, U.S.
FILED
MAR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO
LLOYD BRASILEIRO,

Petitioner,

vs.

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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15 pp

Questions Presented

1. Whether an ocean carrier is liable for misdelivery of cargo when it authorized the release of cargo by foreign port authorities to a consignee without requiring production of the original order bill of lading.

2. Whether bags of caprolactam or pallets should be deemed packages for the purpose of the $500 per package limitation of "Cogsa" [46 U.S.C. 1304(5)].

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying Certiorari	5
1. Petitioner has failed to show any conflict between the Circuits as to the carrier's obligation to ensure that the proper party receives goods under an order bill of lading	5
2. The Court of Appeals correctly upheld the District Court's finding that the parties did not intend the pallets to be packages	7
3. The Courts below correctly applied United States law	9
Conclusion	10

TABLE OF AUTHORITIES

CASES:	Page
Allied International American Eagle Trading Corp. v. S.S. "Yang Ming", 672 F.2d 1055 (2d Cir. 1982)	8
American & Far Eastern Trading Co. v. Sea-Land Services, Inc., 493 F. Supp. 125, aff. 678 F.2d 830 (9th Cir. 1982)	7
Anderson v. City of Bessemer City, 105 S. Ct. 1504, 84 L.Ed. 518 (1985)	7
Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam, 759 F.2d 1006 (2d Cir. 1985)	7
Constable v. National Steamship Co., 154 U.S. 51 (1894)	5
David Crystal, Inc. v. Cunard Steamship Co., 339 F.2d 295 (2d Cir. 1964), cert. den. 380 U.S. 976 (1965)	6
Farrell Lines v. Highlands Insurance Co., 696 F.2d 28 (2d Cir. 1982)	5
Mitsui & Co. Ltd. et al v. American Export Lines, Inc., 636 F.2d 807 (2d Cir. 1981)	7
Morse Electro Products Co. v. S.S. Great Peace, 437 F. Supp. 474 (D.C.N.J. 1977)	6
The Cabo Villano, 14 F.2d 978, mod. 18 F.2d 220 (2d Cir. 1927)	6

Page

STATUTES:

The Carriage of Goods By Sea Act ("Cogsa"), 46 U.S.C. §1304(5) ..... i, 3

The Pomerene Act, 49 U.S.C. 81 et seq 5

CONVENTION:

1968 Brussels Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 8

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Respondent*, respectfully submits this Statement of the Case only to the extent necessary to correct inaccuracies and omissions in petitioner's statement.

Respondent, a shipper, instituted suit to recover money damages against petitioner, an ocean carrier, for breach of a contract

* Respondent Allied Chemical International Corp. was a wholly owned subsidiary of Allied Corporation. After judgment was entered in the District Court and while the appeal was pending in the Court of Appeals, Allied Corporation merged with the Signal Corp. and is now known as Allied-Signal Corp.

of carriage of goods or alternatively for conversion, both founded on a misdelivery of goods shipped from the United States by respondent on petitioner's vessel to a Brazilian consignee. The goods were sold on terms of sight draft against documents, including the original order bill of lading, forwarded by respondent to a local Brazilian bank for handling and collection. The documents were only to be delivered against payment of the sight draft.

Respondent contended that petitioner improperly caused the goods to be delivered to the consignee without requiring production of the original order bill of lading, as is required in overseas trade, thus enabling the consignee, who later became insolvent, to obtain possession of the goods without making payment therefor.

Petitioner, on the other hand, contended that it made a proper delivery of the goods under its contract of carriage with respondent when it made physical delivery to the Brazilian port authority charged with the responsbility for receiving goods from ocean carriers, and that it was the responsibility of the port authority to obtain the original bill of lading as prerequisite for giving possession to the consignee. Thus, petitioner argued, it was not liable for respondent's loss.

The Courts below both rejected petitioner's argument on the basis of undisputed evidence, not mentioned in the petition, that were it not for the issuance of a document called a "carta declaratoria" (in English "a letter of declaration") by petitioner's agent, the port authority would not have permitted the consignee to take possession of the goods (A-7, par. 6) (A-14, A-24)*. Under Brazilian import regulations, the carta declaratoria was an alternative to the bill of lading as an essential import document. Thus, by issuing the carta declaratoria to the consignee, the petitioner authorized the physical delivery of the goods by the port authority to the consignee without requiring the consignee to produce the original bill of lading.

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* Reference is to petitioner's Appendix.

It is therefore inaccurate for petitioner to say in its Statement of the Case (p. 3) that respondent contended that the letter was improperly used by the consignee to obtain possession of the shipment from the port authority without surrender of the bill of lading, when, the very purpose of the letter, or carta declaratoria, was to be a substitute for the bill of lading, as the record clearly showed. However, by issuing the carta declaratoria, and not requiring the bill, the petitioner acted at its peril. It was no longer relying on documents, but rather on the reputation and honesty, albeit misplaced, of the consignee's agent.

The remaining question raised below and in the petition involves the unpleaded partial defense of a $500 package limitation provided in petitioner's long-form bill of lading which incorporated the provisions of the Carriage of Goods by Sea Act ("Cogsa"), 46 U.S.C. §1304(5)*. Petitioner claims that the pallet was a package for the purpose of limiting respondent's recovery herein.

The District Court, however, found on the evidence presented that the parties intended each bag of caprolactam to be a package, rather than each pallet (A-8, par. 12). The Court further found that respondent declared the nature and value of the cargo in the bill of lading, and that there was no proof that petitioner offered a choice of rates in its tariff or otherwise for purposes of the package limitation (A-8, par. 13). Among the District Court's specific findings on this issue was that "Neither Lloyd's tariff nor its bill of lading provide for any additional freight in the event of a declaration of value in excess of $500 per package." (A-6, par. 21).

And yet, in its brief to the Court of Appeals, petitioner attempted to introduce new evidence to show that it offered a choice of rates to the shipper, but the Court of Appeals, alluding to that

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* The Court of Appeals bypassed the question of whether the failure to plead the limitation as a partial defense constituted a waiver as they agreed with respondent's contention that the pallet should not be considered to be the package and that the limitation was irrelevant.

attempt by petitioner, stated that they were limited to the record and sustained the District Court's finding that respondent had no option to pay a higher rate under the applicable tariff (A-28).

Petitioner here again seeks to introduce new evidence on the same issue when it states on Page 9 of the petition, Point 3, that an *ad valorum* freight bill of lading usually calls for additional freight if the shipper desires to be covered for a value in excess of $500 per package. This attempt by petitioner to inject new evidence into this case should once again be rejected.

The Court of Appeals, in ruling that the question of what constitutes a Cogsa package was in the first instance a matter of contract interpretation and ultimately a question of the parties' intentions, unanimously concluded that the District Court's findings as to the parties' intentions were not clearly erroneous and upheld its decision rejecting this partial defense.

Another point inaccurately stated by petitioner is that the Court of Appeals was critical of the District Court's opinion (sic), giving the impression that such criticism was on the merits. In fact, the criticism was only directed to the District Court's adoption, almost verbatim, of the respondent's findings of fact and conclusions of law and the Court of Appeals actually affirmed the District Court's decision in every respect. Furthermore, on a petition for rehearing and suggestion of a hearing *in banc*, not one Court of Appeals Judge requested that a vote be taken thereon (A-29).

Reasons For Denying Certiorari

1. *Petitioner has failed to show any conflict between the Circuits as to the carrier's obligation to ensure that the proper party receives goods under an order bill of lading.*

Petitioner contends that the decision of the Second Circuit runs counter to a line of decisions, including one of this Court, *Constable v. National Steamship Co.*, 154 U.S. 51, 63, holding in general terms that a carrier's responsibility ceases after delivery of cargo is made according to the custom and usage of the port, in this case, to a government port authority charged with the duty to receive cargo and to physically distribute it to the consignee.

These cases were distinguished in the Courts below from the case at bar because they all involved either cargo damage, shortages or physical loss or disappearance occurring while the goods were in the custody of the port authorities. Not one case involved the failure to produce an original bill of lading as required by the Pomerene Act, 49 U.S.C. 81, et seq., or the carrier's involvement in such failure. Although the District Court referred to the cited cases as being inapplicable (A-7, par. 9), the Court of Appeals apparently did not think it worthy of comment, notwithstanding that petitioner cited the Second Circuit's recent decision in *Farrell Lines v. Highlands Insurance Co.*, 696 F. 2d 28 (2d Cir. 1982) in its brief before that Court, as well as in its petition for rehearing.

More precisely, on the question of whether this Court should grant certiorari to resolve a conflict between Circuits, the petitioner has not cited a single case in another Circuit holding that an ocean carrier is not liable to a shipper when it does not require production of the original bill of lading as a condition for the release of cargo, or holding that a carrier is not liable when it issues a document to a foreign port authority which has the effect of releasing cargo without requiring surrender of the original bill of lading.

The single case which was the most in point and relied on by the Second Circuit is not mentioned or distinguished by the petitioner, *The Cabo Villano*, 14 F. 2d 978, mod. 18 F. 2d 220 (2d Cir. 1927). The Second Circuit there said that the defense of delivery in the usual manner to the Spanish Government did not relieve the carrier of liability because the Spanish Government made the ultimate delivery on the order of the carrier's agent, who relied on the fact that the person to whom the goods were released was a reliable and well-known person. There was no proof in that case that the carrier's agent was compelled under the laws, requirements or custom of the port to make the order for delivery as it did, nor was there proof in the instant case that petitioner's agent was compelled under the laws, requirements or customs of the port of Salvador to issue the carta declaratoria to the consignee's agent.

The critical factor in *The Cabo Villano* case and in the instant case is that the cargo was within the control of the carrier or its agents and that the misdelivery came about as a result of the carrier's voluntary act. See *Morse Electro Products Co. v. S.S. Great Peace*, 437 F. Supp. 474, 482 (D.C.N.J. 1977).

Petitioner further argues that the Court of Appeals relied erroneously on the case of *David Crystal, Inc. v. Cunard Steamship Co.*, 339 F.2d 295 (2d Cir. 1964), cert. den. 380 U.S. 976 (1965) because in that case the cargo was discharged into the hands of the carrier's independent stevedore whereas in the instant case, the goods had been delivered to a government agency. Once it is determined that an ocean carrier has a continuing responsibility, as carrier or bailee, to see that the proper person receives the goods and the carrier has some control over the disposition of the goods, it should make no difference who has physical possession of the goods. However, even on this point, petitioner has failed to cite a single case in conflict with the Second Circuit that makes a distinction between delivery to an independent stevedore as against delivery to a government agency.

Petitioner attempts to show a conflict between the Second and Fifth Circuits with respect to clause 12 of petitioner's bill of lading

which the Fifth Circuit upheld, but which the Second Circuit held to be null and void. Each Court, however, was applying the clause to a different set of facts. In the Fifth Circuit, it was applied to a case of a disappearing container which had been delivered by the carrier to the port authority and was lost through no fault of the carrier. In the instant case, it was applied to the active involvement of the carrier in authorizing the port authority to release cargo without calling for the surrender of the bill of lading. Conceivably, the clause could be valid for one purpose and invalid for another. Therefore, respondent submits that, on the different facts, the two Circuits are not in conflict on an important or novel question of federal law.

2. *The Court of Appeals correctly upheld the District Court's finding that the parties did not intend the pallets to be packages.*

In upholding the findings of the District Court that the parties did not intend the pallets to be packages, The Court of Appeals followed the clear direction of this Court in the recent case of *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1511, 84L.Ed.2d 518, 527 (1985), that findings by the District Court cannot be disturbed unless, on the basis of the entire record, they are clearly erroneous. Since the Court of Appeals had the benefit of the complete record and showed that it fulfilled its reviewing responsibility, little need be said on this issue beyond what is set forth in the Court of Appeals opinion (A-25-28).

Petitioner's reason for certiorari on the package limitation issue is founded on a plea for uniformity in maritime law and foreign commerce*, but petitioner's view would have the opposite result. As noted in *Mitsui & Co. Ltd., et al. v. American Export Lines, Inc.*, 636 F.2d 807, 821 (2d Cir. 1981) and in *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1013 (2d

* Petitioner incorrectly stated that this is the first case where a court has held a pallet not to be a package. It was so held in *American & Far Eastern Trading Co. v. Sea-Land Services, Inc.*, 493 F. Supp. 125, aff. 678 F.2d 830 (9th Cir. 1982).

Cir. 1985), the 1968 Brussels Protocol to Amend The International Convention for The Unification of Certain Rules of Law Relating to Bills of Lading* would provide in a case like the instant one, that the "article of transport," i.e. the pallet, shall not be deemed to be the package. This Protocol was signed by the United States, but not ratified, but the necessary number of countries signed it so as to come in effect in 1977. Thus, petitioner would have this Court adopt a hard and fast rule contrary to one already in use in many countries by law, an adoption which would be the antithesis of uniformity. The trend, if anything, appears to be the other way, towards the Protocol definition.

True, the Second Circuit in *Allied International American Eagle Trading Corp. v. S.S. "Yang Ming"*, 672 F.2d 1055 (2d Cir. 1982), was unwilling to abide only by the written notice in the bill of lading of the number of units on the pallets, if the bill elsewhere listed the number of pallets as the number of packages. But in the instant case, without the additional reference, the Second Circuit was constrained to give equal consideration to the fact that the number of pallets was listed once, as was the number of bags. If there was nothing more, the principle that ambiguities in contracts of adhesion must be resolved against the issuing carrier should have tipped the scales in favor of the shipper at that stage of the case. However, the Courts below further found that the shipper had declared the nature and value of the goods, that the freight rate was based on the value of the goods and that under the applicable tariff, respondent "had no option to pay a higher rate." Under those circumstances, the Court of Appeals properly said that "Allied could reasonably have expected to recover their value if they were lost. Similarly, having levied a

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*The Brussels Protocol provides in pertinent part as follows:

"...(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

rate keyed to value, Lloyd could reasonably have expected to be liable for that value. It would be illogical to ascribe a contrary intent to the parties." (A-28).

Respondent heretofore discussed the effort by petitioner to introduce new evidence in the appeal of the case and in its petition with respect to an alleged additional freight charge if the shipper desired coverage in excess of $500 per package, an attempt rejected by the Court of Appeals, and which should be rejected once again. Suffice it to say that not having a choice of rates, the cases cited by petitioner where a tariff provides for a choice of rates are inapposite.

3. *The Courts below correctly applied United States Law.*

Petitioner's contention with respect to applicability of Brazilian tort law was met head-on by the Court of Appeals (A-24) and need not be repeated. However, it should be noted that if petitioner's argument is accepted, respondent would be without a remedy, for petitioner contends that under Brazilian law, the carrier would not be liable either under contract or in tort. It is also evident that the Brazilian port authorities would also not be liable because they acted in accordance with their own import regulations which allowed them to accept a carta declaratoria from the ocean carrier, in place of the bill of lading. Such result would be disastrous to international trade and commerce.

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the application for a writ of certiorari be denied.

Respectfully submitted,

IRVING RONALD STORCH
Attorney for Respondent

MOTION FILED
MAR 12 1986

No. 85-1346 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Petitioner,

—v.—

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF INTER-AMERICAN FREIGHT CONFERENCE, SECTIONS A AND D

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1346

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Petitioner,

—v.—

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Applicants, Inter-American Freight Conference, Sections A and D, respectfully move this Court for leave to file the accompanying Brief in this case as *amicus curiae*.

Consent to the filing of the accompanying brief was obtained from Francis R. Matera, Esq., attorney for the petitioner in this case. A letter dated January 23, 1986 was sent to Irving R. Storch, Esq., attorney for the respondent, requesting his consent to our appearance as *amicus curiae* on behalf of the applicants and our filing of briefs in that capacity. Unfortunately, Mr. Storch responded by letter dated January 27, 1986 that he was unable to consent to our appearance or filing of a brief.

The applicants Inter-American Freight Conference, Sections A and D have the following interests in this case:

(1) The tariff which governed the shipment in this case and was central to at least one aspect of the Court of Appeals decision below was established by applicant Section A and was filed with and regulated by the Federal Maritime Commission (FMC), and

(2) Both Section A directly and its sister Section B indirectly have interests in protecting the integrity of their tariffs from the uncertainty created by the Court of Appeals decision with respect to limitation of liability, which has placed the petitioner and other member carriers of the applicants in the impossible position of either disregarding the decision or violating the tariffs on file with the FMC.

While the petitioner has raised the issue of limitation of liability both before the Court of Appeals and in its Petition for Certiorari in this Court, it has not presented the tariff for the Court's consideration and has not brought to bear upon the argument the same perspectives which the applicants have upon the importance of preserving the clarity of the tariff provisions. In the accompanying Brief, the applicants have provided certified copies of the tariff provisions relevant to this case and have shown how their status as binding legal requirements dictates that the Court of Appeals findings on limitation of liability were incorrect.

If this Court agrees that these findings are incorrect, the decision of the Court of Appeals should be reversed or remanded for further proceedings.

We therefore request this Court to grant us leave to file the accompanying Brief as *amicus curiae*.

Respectfully submitted,

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Dated: March 12, 1986

TABLE OF CONTENTS

	PAGE
Table of Authorities	v
Interests of Inter-American Freight Conference, Sections A and D	1
Summary of Argument	3
Argument	3
Conclusion	8
Appendix	A-1

TABLE OF AUTHORITIES

Cases PAGE

Allied Chemical International Corp. v. *Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), reprinted in Petition for Certiorari, p. A-10 . . . 4, 6

Atchison, T. & S.F. Ry. Co. v. *City of Chicago*, 240 F.2d 930 (7th Cir.), *aff'd*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1957) 5

Brown & Root, Inc. v. *M/V PEISANDER*, 648 F.2d 415 (5th Cir. 1981) 4

Compania Anonima Venezolana De Navegacion v. *A.J. Perez Export Co.*, 303 F.2d 692 (5th Cir.), *cert. denied*, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276 (1962) 5

Gilbert Imported Hardwoods, Inc. v. *245 Packages of Guatambu Squares*, 508 F.2d 1116 (5th Cir. 1975) 5

John Deere & Co. v. *Mississippi Shipping Co.*, 170 F. Supp. 479 (E.D. La. 1959) 4

Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) 5

Newcomb v. *Brennan*, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977) 5

New York, N.H. & H.R. v. *Nothnagle*, 346 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953) 4

Statutes

Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-15 . . . . . 3, 4, 6, 7

Shipping Act, 1916, 46 U.S.C. §§ 801-42 . . . . . 2, 5, 7

Shipping Act of 1984, 46 U.S.C. app. 1701-20 . . . . . 2, 5, 7

Miscellaneous

U.S. Maritime Administration, United States Oceanborne Foreign Trade Routes (1985) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1346

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Petitioner,

—v.—

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE INTER-AMERICAN FREIGHT CONFERENCE SECTIONS A AND D

The Inter-American Freight Conference, Sections A and D, as *amicus curiae*, respectfully request that this Court grant the Petition for Certiorari in this case for the reasons set forth hereinafter.

INTERESTS OF INTER-AMERICAN FREIGHT CONFERENCE, SECTIONS A AND D

The Inter-American Freight Conference (IAFC) is a non-profit organization comprised of oceangoing common carriers engaged in the transportation of cargo between ports on the

United States Atlantic and Gulf Coasts and ports in Argentina, Brazil, Paraguay and Uruguay. Its formation and operations are governed by an agreement (FMC No. 202-009648A) that has been filed with the Federal Maritime Commission (FMC) and is regulated under the Shipping Act of 1984, 46 U.S.C. app. 1701-20.[1]

The IAFC is divided into four geographically-defined Sections, each of which has been delegated with the authority to establish tariffs containing the rates, charges, rules and practices applicable to the shipments transported by the carriers which are members of the Section. IAFC Sections A and D, which are represented in this Brief, cover the southbound trades from U.S. Atlantic and Gulf ports to ports in Brazil (Section A) and ports in Argentina, Paraguay and Uruguay (Section D).

The petitioner in this case is a member of both Sections A and D, and the shipment which is the subject of this case was within the trade covered by IAFC Section A and was thus governed by the tariff established by that Section.

Since the Court of Appeals decision on the limitation of liability issue depends upon this tariff, that Section has a direct interest in this case. In addition, both IAFC Sections A and D have an interest in overturning the decision on that issue under which, as shown below, the members of the Sections would have the impossible choice either of disregarding the decision or of violating tariff provisions that have the force of law.

---

1 At the time of the shipment in this case, the IAFC was regulated under the Shipping Act, 1916, 46 U.S.C. §§ 801-42. Ocean shipping was removed from that Act when the Shipping Act of 1984 was enacted. See 1984 Act, § 20(a)-(b), 98 Stat. 67, 88-89 (1984).

SUMMARY OF ARGUMENT

The Court of Appeals decision should be reversed in respect of its holding that the petitioner carrier was not entitled to the statutorily prescribed limited liability for cargo loss or damage, since the respondent shipper did not satisfy the bill of lading and tariff requirements for overcoming the limitation of liability and the tariff binds both the carrier and shipper with the force of law.

ARGUMENT

The liability of ocean carriers for damage or loss of cargo is governed by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-15. Central to this carefully crafted statute is Section 4, 46 U.S.C. § 1304, which specifies the substantive defenses available to the carrier and, where such defenses are not present, provides for a limitation upon such liability in the amount of $500 per package or, as to cargo not shipped in packages, $500 per customary freight unit.

However, COGSA also affords a shipper the choice of opting out of this limitation of liability by complying with the requirements of Section 4(5), 46 U.S.C. § 1304(5), which provides in part as follows:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

> By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

This provision has been said to be "the congressional response to Supreme Court decisions which for well over a century consistently held that only when a common carrier grants its shippers a 'fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained.' " *Brown & Root, Inc.* v. *M/V PEISANDER*, 648 F.2d 415, 420 n.11 (5th Cir. 1981), quoting *New York, N.H. & H.R.* v. *Nothnagle*, 346 U.S. 128, 135, 73 S.Ct. 986, 990, 97 L.Ed. 1500, 1507 (1953).

"The Act thus gives the shipper an option of to avoid the limitation of liability and make the carrier the insurer of the cargo. To exercise this option effectively, the shipper must declare the value of the cargo, insert the declared value in the bill of lading and pay higher freight rate." *John Deere & Co.* v. *Mississippi Shipping Co.*, 170 F. Supp. 479, 481-82 (E.D. La. 1959).

Under Clause 17 of the bill of lading covering the shipment in this case, the petitioner's liability for loss or damage to the cargo was limited to the COGSA $500 per package limitation "unless the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the Bill of Lading *and extra freight paid*." See Court of Appeals decision below, reported at *Allied Chemical International Corp.* v. *Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 484-85 (2d Cir. 1985), reprinted in Petition for Certiorari, p. A-10, A-25 (emphasis added).

With respect to the extra freight payable, attached hereto as an appendix are four pages of IAFC Section A Tariff FMC-15, which have been certified by the Federal Maritime Commission to be the tariff pages on file and in effect at the time of the

shipment in this case (October 1980). This tariff was required to be filed with the FMC under Section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(1), as in effect at the time of the shipment. Under Section 18(b)(3) of that Act, 46 U.S.C. § 817(b)(3), the petitioner and the other carrier members of Section A were required to adhere to the rates and charges prescribed in Tariff FMC-15. Shippers were likewise constrained to follow these tariff provisions under Section 16 of the Act, 46 U.S.C. § 815.[2]

Like all regulated transportation tariffs, Tariff FMC-15 is considered to have the force of law. As this Court stated in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (citations omitted):

> Until changed, tariffs bind both carriers and shippers with the force of law. Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property.

See also *Gilbert Imported Hardwoods, Inc.* v. *245 Packages of Guatambu Squares*, 508 F.2d 1116, 1120-21 (5th Cir. 1975) (stating the same conclusion with respect to a tariff of the IAFC); *Compania Anonima Venezolana De Navegacion* v. *A.J. Perez Export Co.*, 303 F.2d 692, 696 n.12 (5th Cir.), *cert. denied*, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276 (1962) (holding that a published tariff rate is not "a mere matter of contract" but becomes "a rate imposed by law"); *Atchison, T. & S.F. Ry. Co.* v. *City of Chicago*, 240 F.2d 930, 937 (7th Cir.), *aff'd*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1957) (declaring that a tariff is to be treated the same as a statute).[3]

---

2 In 1984, ocean shipping regulation was removed from the Shipping Act, 1916, and re-enacted under the Shipping Act of 1984, which contains provisions imposing the same tariff requirements as those set forth above. See 1984 Act, §§ 8(a), 10(a)(1), 10(b)(1)-(4), 46 U.S.C. app. 1707(a), 1709(a)(1), 1709(b)(1)-(4). See also note 1 *supra*.

3 As a statutory matter, Tariff FMC-15 is properly the subject of judicial notice. *Newcomb* v. *Brennan*, 558 F.2d 825, 829 (7th Cir.), *cert. denied*, 434 U.S. 968, 98 S. Ct. 513, 54 L. Ed. 2d 455 (1977).

In this case, the commodity rate on the cargo (caprolactam) shipped by the respondent depended upon its value. For caprolactam valued at less than $2,000 per 2240 lbs. the commodity rate was $110.00 per weight ton (also 2240 lbs.); and for caprolactam valued at greater than $2,000 per weight ton the commodity rate was $131.50 per weight or measurement ton. See IAFC Section A Tariff FMC-15, p. 101, attached hereto as p. A-5. This commodity rate was reflected in the statement "Rate: $110.00 LT Value: $1657.00 LT" appearing under the column "Description of Packages and Goods" on the bill of lading. *Allied Chemical International Corp.* v. *Companhia de Navegacao Lloyd Brasileiro*, *supra*, 775 F.2d at 485, Petition for Certiorari at p. A-26-27.

The Court of Appeals held that the payment by the respondent of this commodity rate of $110.00 per ton was sufficient without payment of any additional amount to impose liability upon the petitioner beyond the COGSA package limitation:

> Caprolactam valued at less than $2,000 per long ton was charged a rate of $110 per long ton. J.App. at 165. More valuable caprolactam was charged a rate of $131.50 per long ton. *Id.* Thus, under the applicable tariff, Allied had no option to pay a higher rate. Having paid a freight charge based on the value of the goods, Allied could reasonably have expected to recover their value if they were lost. Similarly, having levied a rate keyed to value, Lloyd could reasonably have expected to be liable for that value. It would be illogical to ascribe a contrary intent to the parties.

Id., 775 F.2d at 486, Petition for Certiorari at p. A-28.

Far from being illogical, however, the contrary is exactly what is legally required of the petitioner and the other members of the IAFC Section A under the applicable tariff. Under the first paragraph of Rule 12 on pages 26 and 27 of the Section A tariff (Appendix pp. A-3-4 attached hereto), the carrier's liability as to the value of shipments is determined in accordance with the carrier's bill of lading. As indicated

above, the petitioner's bill of lading required that extra freight be paid in order for a shipper to recover greater than $500 per package for loss or damage to goods. The second paragraph of Rule 12 requires that "such additional liability only will be assumed by the carrier at the request of the shipper and upon payment of an additional charge of two per cent (2%) of the total declared valuation in addition to the stipulated rate on the commodities shipped as specified in this tariff." *Id.*

By holding that where the commodity rate depends upon the value of the cargo no additional amount need be paid by a shipper for coverage over $500 per package, the Court of Appeals has placed the petitioner and the other member carriers of the IAFC Section A in the position of having to violate the provisions of Rule 12 in Tariff FMC-15. This is in direct conflict with their obligations under the Shipping Act and the legally binding regulated tariff discussed above. It also defies credulity that a shipper could be held to receive a substantial insurance coverage for its cargo over and above the package limitation without the payment of any additional freight charges. It is not only unfair to the carrier, but also inequitable to shippers that have not been granted this windfall but have paid the proper ad valorem rate under Rule 12.

The statutory limitation for cargo loss or damage has been thrown into considerable uncertainty as a result of the Court of Appeals decision.[4] Such uncertainty can only be a hindrance to the promotion of U.S. trade, which is one of our major national interests. In view of the fact that the regulated or liner

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4 We have not argued the other issues raised the petitioner in its Petition for Certiorari not because we do not agree with the petitioner's positions (which we do), but because they do not call into question the integrity of the tariffs. However, the same interest of certainty in allocating risk of loss or damage between carrier and shipper has been jeopardized by the Court of Appeals in respect of the definition of a "package" for purposes of the COGSA limitation. The Court of Appeals incorrectly rejected the only number which was clearly set forth within as column on the bill of lading that was unambiguously labeled "No. of Pkgs." See Petition for Certiorari, pp. 6-9.

segment accounts for more than half by value of all U.S. ocean trade,[5] it is especially important to maintain and enforce the provisions regarding shipper and carrier rights that have been established in legally binding tariffs.

CONCLUSION

In respect of its findings as to limitation of liability, the Court of Appeals decision places the petitioner and the other member carriers of the Inter-American Freight Conference Sections A and D in the impossible position of having to violate tariffs that have the force of law in order to comply with the decision.

We therefore urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

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Counsel for Applicants
Inter-American Freight
Conference, Sections A and D

Dated: March 12, 1986

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5 U.S. Maritime Administration, United States Oceanborne Foreign Trade Routes 277 (1985).

APPENDIX

UNITED STATES OF AMERICA

FEDERAL MARITIME COMMISSION

Washington, February 26, 1986

I HEREBY CERTIFY that the annexed are true copies of 2nd Revised Title Page, Original Page 26, 1st Revised Page 27 and 11th Revised Page 101 to Inter-American Freight Conference Tariff FMC-15 in effect as of October, 1980, as they appear on file in the Federal Maritime Commission.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Maritime Commission to be affixed, on the day and year first above written.

[SEAL]

/s/ JOHN ROBERT EWERS
Secretary
Federal Maritime Commission

Inter-American Freight Conference

Section A - F.M.C. Agreement No. 3648-A
Tariff No. 8 (F.M.C. No. 15)
Cancels Tariff No. 6 (F.M.C. No. 13)

Orig./Rev.	Page
2nd Revised	Title
Cancels	Page
1st Revised	Title
Effective Date	
May 27, 1980	
Correction	800

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Local Commodity Rates for Direct or Transhipment Service

See Rule 13

for

General and Refrigerated Cargo

from

United States Atlantic and Gulf Ports

See Rule 1

to

Ports of Brazil

See Rule 21 and Outport Differential Section

Participating Carriers are listed on pages 7 to 10

Transportation under the provision of this tariff is subject to the terms of individual carrier bills of lading as shown in *Inter-American Freight Conference* Tariff No. 4 (F.M.C. No. 10). Please refer to Rule 8 herein.

All rates, rules, regulations, charges, conditions, commodity descriptions, packing requirements or any other provisions of this tariff are explicit and subject to Conference interpretation only. All questions as to application of any part of this tariff must be referred to the Conference office for determination or interpretation.

(I) Anti-rebating certification to be found in Tariff Rule 41.

This tariff is made available to the public by subscription on application to the Conference. The subscription price is $125.00 including mailing of all supplements and re-issue for 12 calendar months from effective date of subscription. Subscriptions mailed outside the United States will be $225.00 per 12 month period.

Issued by

Paul B. Thornquist
Executive Administrator
17 Battery Place
New York, N.Y. 10004
Telephone (212) 425-8075
TWX 710-581-4278

(I) In accordance with F.M.C. SPF 1025 dated April 29, 1980

ocr'd pic 5-23-00

FREIGHT FORWARDER BROKERAGE & COMPENSATION (continued)

BROKERAGE OR COMPENSATION (continued)

Compensation and/or Brokerage may not be deducted from ocean freight and other charges due in accordance with the rates and conditions contained in this tariff.

RULE 10 APPLICATION OF SURCHARGE AND/OR OUTPORT DIFFERENTIALS

For application of all surcharges, refer to page 13. For application of outport differentials, refer to page 14.

RULE 11 MINIMUM QUANTITY RATES

When two or more freight rates are named for carriage of goods of the same description over the same route and under similar conditions and the application is dependent upon the quantity of the goods shipped, the total freight charges assessed against the shipment shall not exceed the total charges computed for a larger quantity, provided, however, that the rate noted alongside a qualification specifying a required minimum quantity, either weight or measurement per container or in containers, will be applicable to the contents of the container(s), provided, the minimum set forth is met or exceeded. At the shipper's option, a quantity less than the minimum level may be freighted at the lower rate, provided the weight or measurement declared for rating purposes is increased to the minimum level.

RULE 12 AD VALOREM RATES

The liability of the carriers as to the value of the shipments at the rate provided in this tariff shall be determined in accordance with the clauses of the carrier's regular form of bill of lading.

If the shipper desires to be covered for a valuation in excess of that allowed by the carrier's regular form of bill of lading, the shipper must so stipulate in carrier's bill of lading covering such shipments and such additional liability only will be assumed by the carrier at the request of the shipper and upon payment of an additional charge of two per cent (2%) of the total declared valuation in addition to the stipulated rate on the commodities shipped as specified in this tariff.

(continued on next page)

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061 REC FMC 4-3-79

AD VALOREM RATES (continued)

Currency, specie, gold or silver bullion, precious metals, U.S. and negotiable securities will be carried at the following rates:

A) 1% ad valorem on first $25,000.00 valuation; $250.00 plus 1/2% ad valorem on excess valuation over $25,000.00 up to and including, $100,000.00; $625.00 plus 1/3% ad valorem on excess of valuation over $100,000.00.

(A) B) Minimum bill of lading charge - $80.00

C) EXCEPTION: 1/5% ad valorem on shipments of gold bullion in excess of $1,000,000.00 valuation on one bill of lading. Not subject to surcharge.

RULE 13 TRANSSHIPMENT SERVICE

Except as may otherwise be provided, rates named herein are for direct call only and bills of lading shall be issued only from and only to ports which the loading vessel actually calls. Subject to respective government regulation, no cargo shall be accepted on a transshipment basis and the issuance of through bills of lading is prohibited.

A) EXCEPTION: Cargo may be accepted on transshipment basis at direct call rates and through bills of lading may be issued to ports for which direct call rates have been established, provided, however, that the transshipment shall not be made at a port or ports in the United States of America or at ports outside the scope of the Conference Agreement.

B) EXCEPTION: For operating reasons or carrier's convenience, a carrier may, at ports within the scope of the Conference Agreement:

1) Discharge at another port and tranship to port of destination at carrier's expense; or

(continued on next page)

189 REC FMC 11-30-79

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Form A-102

Inter-American Freight Conference

Section A, Tariff No. 8 (F.M.C. No. 15)

From: United States Atlantic and Gulf Ports

To: Ports of Brazil

Orig./Rev.	Page
11th Rev.	101
Cancels	**Page**
10th Rev.	101
Effective Date	
October 1, 1980	
Correction	1053

Except as otherwise specifically indicated, rates shown herein apply to base ports of Recife, Salvador, Rio de Janeiro, Santos and Paranagua, Brazil. To other ports within the scope of this tariff, refer to the Outport Differential Section, page 14. Surcharges applicable to various ports are shown on page 13. Except as otherwise specifically provided herein, rates apply per ton of 2,240 lbs. (W) or 40 cubic feet (M), whichever yields the higher revenue. For abbreviations and reference marks, see pages 11 and 12.

COMMODITY RATE SECTION	*2%	Rate Basis	Rate
Cable, Electric, Aluminum, with or without steel core - See Aluminum Cables			
Cable, Electric, Brass, Bronze or Copper, plain or steel armored, lead covered or armored lead covered - See Copper Cable			
Cable Rings - See Rope, Wire and Steel			
CABLE, STEEL		W/M	$203.50
CALCIUM, CARBIDE		W/M	117.00
Calcium, Carbonate - See Talc			
CALCIUM CASEINATE		W/M	217.00
CALCIUM, CHLORIDE, DRY		WT.	117.00
CALCIUM CYANAMIDE, FERTILIZER or INDUSTRIAL GRADE		WT.	110.50
CALCIUM FORMATE		WT.	174.00
CALCIUM HYDROXIDE (LIME)		W/M	131.50
CALCIUM, HYPOCHLORITE		W/M	156.50
CALCIUM PHOSPHATE, DE-FLUORINATED		W/M	96.50
CALCIUM PHOSPHATE, MONOBASIC or DIBASIC		WT.	165.00
Calcium Phosphate, Natural - See Rock, Phosphate			
CALCIUM PHOSPHATES, N.O.S.		WT.	223.00
CALCIUM SILICATE, HYDRATED		WT.	229.00
CALCIUM, SILICON or CALCIUM SILICIDE, containing 20 to 35% calcium and 60 to 65% silicon		W/M	229.00
CALCIUM SILICON or CALCIUM SILICIDE, N.O.S., in hermetically sealed drums		W/M	458.00
CAMPHENE		W/M	217.00
(R) EXCEPTION: TO BASE PORTS ONLY - Flashpoint not less than 100 degrees (Fahrenheit) -- $145.50 WT. Expires: March 31, 1981			
CAPROLACTUM:			
Value not to exceed $2,000.00 per 2240 lbs		WT.	110.00
Value over $2,000.00 per 2240 lbs		W/M	131.50
EXCEPTION: TO BASE PORTS ONLY - In 20 ft. House to House containers, subject to container rental but not subject to House to House discounts. Subject to minimum weight per container 27,000 lbs. Bunker Surcharge to be assessed per weight ton -- $1,500.00 each			
(R) Expires: December 31, 1980			

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*2% ad valorem

bidding contractor that had made every feasible effort to solicit MBE participation to re-work its bid after the bids had been opened, on account of an MBE coming forward only then to indicate its interest.[14] However, Croson's bidding experience does not establish that the City has administered the Plan in this manner. As discussed in more detail supra, a local MBE claimed that Croson had not contacted him until the very day that bids were due. At that time the MBE undisputedly indicated his desire to participate, and continued to do so through the time that Croson requested a waiver. The City's denial of Croson's request for waiver in such circumstances does not establish how the City would respond to a request for waiver where a non-MBE contractor is unable to find any MBEs to participate after undisputedly making every feasible

effort to do so, and an MBE comes forward only after the bids have been opened.

Plaintiffs' final objection to the Plan's waiver mechanism is that there is no adequate appeals procedure when a request for waiver had been denied. The court rejects this objection for the following reasons. First, plaintiffs cite no authority for their contention that an appeals procedure is a sine qua non for a valid waiver mechanism in a minority set-aside program. The point of the waiver mechanism for equal protection purposes is to ensure that the minority set-aside program be sufficiently flexible that it is not applied unfairly whose its remedial goals cannot be met. To be sure, an appeals procedure for decisions about waivers may provide some additional assurance that the waiver decision is correctly made. But plaintiffs have not shown, and this Court

is not persuaded, that the availability of an appeals procedure for waiver determinations is essential for equal protection purposes.

But assuming that the availability of an appeal procedure is constitutionally significant, plaintiffs have not shown that the City's procedure is inadequate. The City has a procedure by which a disappointed bidder may protest an award or a decision to award a contract. See Richmond, Va. City Code Ch. 24.1, Art. VII(C). There is no reason why a disappointed low bidder whose request for waiver is denied cannot protest this denial under Article VII(C), once the City decides to award the contract to some other bidder. It may be that such a protest is not available where the City decides to re-bid a contract instead of award it to another bidder.[15] But even if a protest does not

lie where the City decides to re-bid the contract, it should not amount to a constitutional defect--at least where there is no showing that the City is using its authority to re-bid contracts so as to convert the 30% MBE participation goal into an inflexible requirement.[16]

c. Consideration of Alternative Remedies.

Plaintiffs also argue that the Plan is unconstitutional because the Council did not consider the efficacy of alternative remedies. The Court does not find any deficiency in this respect, however. Despite federal, state, and local assistance of various kinds to minority businesses, minority businesses participated in miniscule proportions as prime contractors in the City's construction contracts from 1978 to 1983. Some of those methods of assistance were

explicitly referred to at the hearing. See Transcript of Hearing at 10 (remarks of Mr. Deese). The council members were no doubt also aware of other governmental efforts at various levels to promote minority business development. The plan was both criticized as too drastic, see id. at 48 (remarks of Mr. Kemp), and praised as essential if reasonable levels of minority participation in the City's construction contracts were to be a reality in the near future. See id. at 49 (remarks of Mr. Richardson). All this indicates that the City Council considered the efficacy of alternative responses to promoting greater minority business participation in the City's construction contracting--and rejected them. While plaintiffs assert that the City's consideration of alternatives was inadequate, the only authority they assert for their position is a remark by

Justice Powell in Fullilove that merely identifies the "efficacy of alternative remedies" as a factor to be considered in reviewing race-conscious remedial programs. See Fullilove at 510. As the City notes, no court has yet struck down a minority set-aside program on the ground asserted.

d. Duration of the Remedy.

Justice Powell identified the duration of the minority set-aside program as another factor to be considered in evaluating its validity. Fullilove, supra, 448 U.S. at 510. The City's Plan is scheduled to expire on June 30, 1988--just over five years after its initial adoption. Plaintiffs do not assert that the Plan's duration is unreasonable, and the Court does not find it so.

e. Effects on Innocent Third Parties.

Justice Powell also emphasized in Fullilove that a minority set-aside program should not be approved without considering its effects on innocent third parties. Plaintiffs argue that the effects of the Plan on innocent third parties render it invalid. This factor identified by Justice Powell has not been established as an essential part of the judicial review, for equal protection purposes, of a minority set-aside program. But even if it were, the City's Plan does not appear to be invalid on account of it. The burdens that the Plan may impose on innocent third parties are primarily the following: the burden on non-MBE prime contractors of seeking out MBEs to participate as subcontractors on City construction projects; and the burden on non-MBE subcontractors who would have received some of the City's

construction subcontracting business but for the City's Plan.

Both burdens would seem acceptable, even in Justice Powell's view. The City's construction projects are only some fraction of the overall construction market in the Richmond area, so that non-MBE contractors would hardly be overwhelmed by having to seek out MBE subcontractors in order to compete for City construction contracts. Similarly, non-MBE subcontractors would only be precluded from thirty percent of a fraction of the overall construction market in the area, assuming that the 30% MBE subcontracting goal is met in every contract. Plaintiffs have not shown in any way how the burdens that the Plan may place on innocent third parties would be excessive as a constitutional matter. Indeed, they concede that no court yet has struck down a minority set-aside

program on the ground that it imposes an impermissible burden on innocent third parties.

f. Overinclusiveness.

i. Geographic Limitations.

Plaintiffs' final set of objections to the constitutionality of the Plan focus on three types of overinclusiveness. First, plaintiffs point out that the Plan does not impose any limitation as to where an MBE must be located in order to participate in the Plan. They argue that this renders the Plan impermissibly overinclusive because it allows MBEs outside the Richmond area to become beneficiaries of the Plan. In support of this point, plaintiffs note that several other minority set-aside programs challenged in the courts have included geographic limitations. See, e.g., Arrington v. Associated General Contractors, supra, 403 So. 2d at 897.

But they do not cite, nor has the Court found, any case holding a minority set-aside program to be impermissibly overinclusive because of the lack of any explicit geographic limitations; nor does this Court find the lack of geographical limitations in the instant case permissible.

The Court notes that plaintiffs have not shown that contractors have in fact been required to subcontract to distant MBEs in order to satisfy the requirements of the Plan. Further, as the City points out, if the Plan had limited participants based on explicit geographic boundaries, it may have been subject to challenge under the Privileges and Immunities Clause. See United Building and Construction Trades Council of Camden County & Vicinity v. Mayor and Council of the City of Camden, ____ U.S. ____, 52 U.S.L.W. 4187 (Feb. 21, 1984). Finally,

even assuming that MBEs outside the ordinary Richmond construction contracting area occasionally participate as MBEs under the Plan, no impermissible overinclusiveness would result. A minority set-aside program need not employ means that absolutely guarantee that only those MBEs intended to participate will in fact participate. Rather, there must be a "reasonable assurance" that the application of the MBE program will be limited to accomplishing its remedial objectives. Fullilove, supra, 448 at 489. The Plan does not need an express geographic limitation to provide such reasonable assurance. Indeed, an arbitrary geographic limitation could actually prevent a minority set-aside program from fulfilling its remedial purposes by excluding minority businesses that happen to fall outside the arbitrary geographic

boundaries, but that nevertheless were discriminated against in the contracting out of City construction projects.

ii. MBEs Not Actually Disadvantaged.

Plaintiffs also complain that the Plan is overinclusive because it may allow MBEs that are not economically or socially disadvantaged to participate in its benefits. They argue that the Plan must have a complaint procedure to prevent unjust participation by minority firms whose access to public contracting has not been impaired by illegal discrimination. The City does not deny that the Plan has no procedure for inquiring into the present effects of past discrimination on particular MBEs.

The Court rejects this challenge, however. It is true that the Chief Justice noted in Fullilove that the minority set-aside program upheld in that

case included a "complaint procedure...to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination" Fullilove, supra, 448 U.S. at 482.[17] But the Chief Justice did not purport to find that such a complaint procedure is essential in order to avoid impermissible overinclusiveness. Indeed, part of the Chief Justice's opinion expressly addresses the objection of overinclusiveness arising from the possibility that specific MBEs may receive benefits that cannot be justified "as a remedy for the present effects of identified prior discrimination." Id. at 486. In addressing this objection, the Chief Justice did not find it necessary that there be a way to exclude the specific MBEs that are not suffering

present effects of past discrimination. Id. at 486-89. Instead, he noted that "spurious minority-front entities can be exposed." Id. at 488. Thus, preventing participation by sham MBEs, rather than rooting out individual MBEs that do not manifest present effects of past discrimination, appears to be the relevant consideration in the Chief Justice's view.

One of the guiding principles that the Chief Justice sets out in Fullilove is that "a program that employes racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." Fullilove, supra, 448 U.S. at 480. Plaintiffs in effect argue that equal protection requires any minority set-aside program to provide for individualized inquiry to ensure that

only MBEs actually suffering present effects of past discrimination are benefited through the program. This is more than narrow-tailoring, however; it is a strait-jacket. Plaintiffs have not persuaded the Court that Fullilove and the Equal Protection Clause require a remedial program to meet this standard.

The Court also notes that the Court of Appeals for the Sixth Circuit expressly rejected an identical overinclusiveness challenge to the State of Ohio's minority set-aside program. That court squarely held:

> The fact that individual minority enterprises may not be able to establish that they have suffered economically from past practices of discrimination is of no importance.

Ohio Contractors Ass'n v. Keip, supra, 713 F.2d at 174. Without making reference to Fullilove, the Court of Appeals cited the opinion of Justices Brennan, White, Marshall, and Blackmun in

Bakke for the proposition that "it is enough that each recipient [of preferential treatment] is within a general class of persons likely to have been the victims of discrimination." Bakke, supra, 438 U.S. at 363.

As discussed supra, the Chief Justice does suggest in Fullilove that, in his view, a minority set-aside program must include reasonable assurances that sham MBEs will not participate. Fullilove, supra, 448 U.S. at 488. The Plan provides such assurance. It requires the HRC to verify that any MBE submitted to meet Plan requirements is a "minority-owned and controlled business." Procedure ¶9 (emphasis original). A decision either verifying or disapproving the MBE status of a firm is ultimately subject to further review, once the City awards the contract or announces a decision to award the contract. At that

point, a disappointed bidder can protest the disapproval of its own MBE or the verification of another MBE, through the protest procedures available under the City's general procurement ordinance. See Richmond, Va. Code Ch. 24.1, Art. VII(C). There are, then, ample assurances that sham MBEs will be properly excluded. Thus, the Plan satisfies any valid overinclusiveness concerns about unjust participation by MBEs.

iii. Minority Groups Not Disadvantaged in Richmond.

Finally, plaintiffs complain that the Plan is overinclusive because it may benefit members of minority groups who have not been victims of discrimination in the construction industry in the Richmond area, such as Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.[18] Plaintiffs assert that the only evidence

presented before City Council concerned blacks.

The Court of Appeals for the Sixth Circuit rejected an almost identical challenge in Ohio Contractors, supra, 713 F.2d at 174. This Court likewise rejects plaintiffs' challenge here. First, the Court notes that the evidence before the City Council reflected limited participation (0.67%) by "minority" contractors in City construction contracts, and compared that participation with the City's "minority" population (50%). While the Court takes judicial notice that blacks are by far the largest racial/ethnic minority in the City, and were thus unquestionably severely underrepresented in City contracting, the participation of minorities besides blacks may have been similarly limited in relation to their proportion of the City's population.[19]

Further, when Congress passed the minority set-aside program upheld in Fullilove, it had concluded that participation in the construction industry by members of all these minority groups has remained limited, due to the continuing effects of past discrimination. See Fullilove, supra, 448 U.S. at 487, n. 73.

The Court sees nothing overinclusive, from a remedial standpoint, about allowing members of such groups who may now be in the Richmond area to participate in the Plan, even though the past discrimination limiting their participation in the construction industry may have occurred elsewhere. Indeed, the past discrimination that affected many of the black MBEs in the Richmond area may have occurred in Atlanta or New York rather than in the Richmond area, but plaintiffs

do not suggest that such MBEs should therefore be excluded.

D. Refusal to Grant Croson's Request for Waiver and Request for Appeal.

Croson has alleged that the City's refusal to grant Croson's request for waiver and denial of Croson's request to appeal was arbitrary and capricious, and denied Croson due process of law under both the Fourteenth Amendment of the United States Constitution and Article One, Section Eleven of the Virginia Constitution. Croson has not referred to the state constitutional due process claim in any of its materials filed after the complaint, however; the Court shall treat that basis of the claim as abandoned.

As for the federal procedural due process claim, the requirements of procedural due process apply only to the

deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). Croson has not even attempted to articulate the nature of any protected property interest it may have. The Court notes, however, that Croson was never awarded the contract at issue, and that the City in its procurement ordinance reserves the right to reject any or all bids or proposals in whole or in part if it is in the City's best interest to do so. See Richmond, Va. Code Ch. 24.1, Art. III (10)(c). Consequently, whatever property interest Croson may have would appear to be quite narrow.

A recent case provides some guidance on the possible property interests arising out of municipal bidding procedures. In Three Rivers Cablevision

v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980), a bidder on a municipal contract made procedural due process claims. The court noted the City's authority to reject all bids, id. at 1130, but proceeded to find a narrow property interest: the right of the lowest responsible bidder in full compliance with the specifications to be awarded the contract once the City decided to make an award. Id. at 1131. The process due such an interest, that court found, was the nonarbitrary exercise by the city of its discretion to make the award. Id.

As a threshhold matter for such an interest to exist, the party claiming deprivation of due process must be the lowest responsible bidder and in full compliance with the contract specifications. See Three Rivers Cablevision, supra, 502 F. Supp. at 1131.

One of those specifications in the City's Plan is, of course, that a contractor on a city construction project must subcontract 30% of the work to an MBE subcontractor, unless it establishes that MBEs are unwilling or unavailable to perform the work. The city reasonably determined that an MBE was available to fulfill the 30% requirement in the jail plumbing fixtures project on which Croson had bid. Indeed, the City twice determined that this was the case. Before making its first determination, the City had received work from Brown stating that his firm, Continental, was an MBE available to supply plumbing fixtures for the project on which Croson had sought waiver. The City's contract officer verified that Continental was on a state listing of MBEs that perform such work. Croson's request for waiver merely stated that Continental was

"unqualified." There was nothing unreasonable about the City's denying Croson's first request for waiver, on November 2, 1983, under these circumstances. Croson renewed its request for waiver after being informed of the City's denial. In support of its renewed request, Croson argued in a letter that Continental could not in fact supply the necessary materials because it had not established the requisite business relationships with the materials manufacturers; it also claimed that Continental had untimely provided a quote, and that the quote was higher than other quotes Croson had received. Continental represented that it could indeed supply the materials and that it did have the requisite business relationship with the manufacturer to do so. Continental also claimed that Croson had not contacted Continental until the

day the bids were due. At the City's request, Croson later submitted information about the extent to which using Continental on the project would increase the project costs. Faced with this information, the City decided on November 18, 1983 to deny Croson's renewed request for waiver because an MBE was available, and to re-bid the project, inviting Croson to submit a new bid. This decision, like the City's first decision to deny Croson's request for waiver, was not unreasonable.[20]

Almost three weeks later, Croson's counsel by letter sought to exercise Croson's "right of review" of the City's denial of its request for waiver, although it did not specify the legal authority for its right of review. The city refused; it had elected to re-bid the project, and informed Croson that there is no right to an appeal of such

decisions. Plaintiffs have not shown that any appeal of the City's decisions to re-bid projects is available.[21] Thus, the City's refusal to give Croson any further consideration of the issue of waiver, after deciding to re-bid the project, was in accordance with its rules. In sum, there was nothing arbitrary or capricious about the City's repeated denials of Croson's request for waiver or about the City's refusal to hear Croson's appeal of that denial. Further, because Croson has failed to establish that it was in full compliance with all the requirements of the contract, it had no protected property interest entitled to procedural due process.

E. Denial of MBE Status to Mega's Subcontractor Taylan.

Mega complains that the City improperly denied MBE status to Taylan,

one of the MBEs submitted in connection with its bid. Mega contends that the City improperly inquired into whether Taylan, the MBE at issue, was 51% minority controlled. Mega apparently believes that this test is improper because it does not mirror the language of the Plan itself. In order for a stock corporation to qualify as an MBE, the Plan requires that "at least fifty-one percent of the stock" be owned and controlled by minority group members. Richmond, Va. Code Ch. 24.1, Art. I (Part B)(27.10). Mega points out that Taylor, a black man, owned 51% of Taylan's stock. Apparently Mega believes that it is inappropriate for the City to inquire into whether a stock corporation's business is minority controlled; the only relevant inquiry in Mega's view is whether 51% of the corporation's stock is minority controlled.

There is no dispute that the City focused on whether Taylan as a business is "minority owned and controlled," rather than whether Taylan's stock is "owned and controlled" by a minority. Indeed, the DGS regulations implementing the Plan call for this inquiry. See Procedure ¶9. The Plan authorizes the Director of DGS to promulgate rules and regulations to implement DGS regulation requiring an inquiry into the minority control of the business itself, rather than the stock of the business, is not unauthorized by or inconsistent with the Plan. The Plan evinces the City's concern that MBEs participating in the Plan be majority-controlled as well as majority-owned. The City amended the Plan precisely for this purpose several months after enacting it, adding to the Plan's definition of "minority business enterprise" the requirement of minority

control. See Richmond, Va., Ordinance to Modify the Definition of "Minority Business Enterprise, etc., 83-127-116, § 1 at 6 (June 20, 1983). It is true, of course, that the ordinance states that a stock corporation qualifies as an MBE where 51% of the stock is owned and controlled by minority group members. But the City Council's obvious purpose behind adding the "control" requirement was to ensure that any business participating in the Plan as an MBE would not be a sham, nominally owned by minority group members but in fact controlled by non-minorities. The fact that the Plan specifies that stock corporations must have 51% of their stock owned and controlled by minority group members was surely not designed as a way to allow businesses that are not actually controlled by minorities to participate in the Plan. Rather, it reflects the

assumption that if 51% of the stock of a business is owned and controlled by minorities, then a majority of the business itself is controlled by minorities. Thus, it is not inconsistent with the Plan for City authorities, in administering it, to make their determination about a firm's MBE status based on an inquiry into minority control of the business as well as minority control of the business's stock, even where the business is a stock corporation.

The City reasonably concluded that Taylan was not 51% controlled by minority group members. When the City made its decision, it knew that Taylan was a new company. It had reliable evidence that--of all of Taylan's management functions--minority control was only exercised in the areas of personnel selection and job supervision. Taylor

himself had no business experience with respect to purchasing, bid preparation, sales, and all financial matters; he was responsible in name only for these areas. In addition, although Taylor was the majority owner of Taylan, his stock was financed entirely by a loan from Mega--his employer. The City did not err in concluding that Taylan, as a business, was not 51% controlled by minority group members.

Indeed, the evidence is such that the City reasonably could have concluded that 51% of the stock, as well as 51% of the business entity itself, was not controlled by a minority. Although Taylor nominally owned 51% of Taylan's stock, the purchase was totally financed at Mega's suggestion by a loan from Mega. For the loan, Taylor gave to Mega a note that was payable on demand and was secured by the stock certificate. While

the agreement pledging the stock certificate as security did state that Taylor retained all rights of ownership, Mega possessed the power effectively to force Taylor to surrender his ownership if he did not comply with Mega's wishes. Not only was the note payable on demand, but Taylor was an employee of Mega's. Had he sought to pay off the loan in order to exercise independent control of his Taylan stock, Mega had the power to terminate Taylor as a Mega employee.

Finally, the Court notes that whatever "rights of ownership" Taylor retained under the pledge agreement are minimal. Taylor theoretically could have sold his Taylan stock, but there would be little if any market for the stock of a new, close corporation, especially where the stock secured a loan. Taylor also was theoretically entitled to share in Taylan's profits according to his

ownership. But Taylan was not earning any overall profit in which Taylor could be expected to participate. Finally, Taylor theoretically could vote his stock (or wield his voting power) to affect Taylan's management policies. But every indication is that Taylor had no role whatsoever in Taylan's long-term management decisions, and only a minor role in Taylan's day-to-day management.

Thus, the City's decision that Taylan is not an MBE (and, therefore, that Mega had not satisfied the Plan requirements) is reasonable, whether the standard for determining a stock corporation's MBE status is minority ownership and control of 51% of the business, or minority ownership and control of 51% of the stock.

F. Federal Statutory Claims.

All the parties agree that plaintiffs' federal statutory claims--42

U.S.C. §§ 1981, 1983, and Title VI, 42 U.S.C. § 2000d--cannot be the basis of a violation unless plaintiffs also establish a violation of the Equal Protection Clause of the Fourteenth Amendment. This is true with respect to the Title VI claims. See Fullilove, supra, 448 U.S. at 517 n.1 (opinion of Brennan, J.). It is also true of plaintiffs' claims under Sections 1981 and 1983, which are predicated on the assumption that the City has denied to plaintiffs their federal constitutional rights. Because the Court has found no constitutional violations, these claims also are denied.

IV. Conclusion

For the reasons discussed above, the Court concludes that all of plaintiffs' challenges to the Plan must fail. The City has moved for an award of its attorneys' fees in both cases under 42

U.S.C. § 1988. These motions will be denied.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date December 3, 1984

FOOTNOTES

[1]The Plan as it now stands was actually passed pursuant to two ordinances. The first ordinance, providing most of the Plan as it now stands, was adopted by the Council on April 11, 1983. See Richmond, Va., Ordinance No. 83-69-59 (April 11, 1983). It was in the nature of an amendment to the City's general procurement procedures for purchasing the City's materials and services, which had been adopted five months earlier. See Richmond, Va., Ordinance No. 82-294-270 (December 20, 1982). The Plan was amended several months after its adoption, changing the definition of minority business enterprise to require control as well as ownership by minority group members. Ordinance No. 83-127-116, § 1 at 6 (June 20, 1983).

[2]This requirement is also satisfied when the contractor itself is an MBE. Richmond, Va. Code Ch. 24.1, Art. VIII-A(A).

[3]The rules promulgated by the Director of DGS governing waivers are embodied in two documents. The first is titled "Purchasing Procedure No. 61" ("Procedure") (attached as Appendix A). The second is titled "Contract Clauses, Minority Business Utilization Plan, Thirty Percent (30%) Award Requirement for Construction") ("Contract Clauses") (attached as Appendix B). As established in these two documents, the waiver process involves DGS and the City's Human Relations Commission (HRC).

Prospective bidders on projects covered by the Plan are notified of the Plan and its waiver provisions at the outset of the bidding on a particular project. They receive in their bid package a copy of Contract Clauses, which informs them that the contract being bid is covered by the Plan, and also explains the Plan and the provisions for waiver. See Procedure ¶2. Prospective bidders also receive in their bid package a "Minority Business Utilization Committment Form" ("Commitment Form"), on which to indicate how they intend to meet their 30% MBE requirement. Contract Clauses list names and telephone numbers of agencies that are available to provide a prospective bidder with assistance in locating an MBE. See Contract Clauses ¶C.

After the close of bidding, DGS opens the bids and determines the apparent low responsive bidder. If that bidder requests a waiver, DGS forwards the request to HRC. Procedure ¶¶5-7. HRC reviews any request for waiver and returns it to DGS with a written explanation for its action. Procedure ¶¶10-12. DGS must then "approve or disapprove waiver, if required." Procedure ¶14.

[4]The protest must be submitted no later than ten days from the date of the award or announcement of the decision to award, whichever comes earlier. Richmond, Va. Code Ch. 24.1, Art. VII(C)(1).

[5]In any case, whatever telephone contacts did occur on September 30 were

brief--from one minute (2 calls) to four minutes (one call), according to telephone billing records. Bonn was not especially helpful to the MBEs he contacted: at least one requested bid specifications, which Bonn declined to provide, although Bonn did inform him about how those specifications could be obtained. Bonn asserts that it is industry custom for the subcontractor to obtain the bid specifications, although the bid clerk of one of the MBEs that Bonn contacted gave contrary testimony in a deposition.

[6]The two provisions are Va. Code § 11-37(5)(Supp. 1984) (requiring public contracts to be awarded to the lowest responsive and responsible bidder), and Va. Code § 11-44 (Supp. 1984) (prohibiting racial discrimination in public contracting).

[7]The exemption reads, in pertinent part:

> ...the provisions of this Act also shall not apply, ... to any county, city, or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles...

Va. Code § 11.35(D)(Supp. 1984).

The statute also requires that any alternative policies and procedures be "generally applicable to procurement of goods and services by such governing body and the agencies thereof," see id. Further, the statute provides that certain provisions of the Procurement

Act--those specified in Section 11-35(E)--cannot be avoided by a local government through the adoption of an alternative procurement plan. See id. Plaintiffs do not contend that the City's procurement plan is not "generally applicable" or avoids any unavoidable provisions of the Act specified in Va. Code § 11.35(E).

[8] Plaintiffs do not argue that the Plan is forbidden by this section. Although plaintiffs did make such an allegation in their complaints, they have since withdrawn that contention, because they recognize that even if it were construed as they would have it, Section 11-44 is not applicable to local governments that have chosen to adopt their own procurement procedures. See Va. Code § 11.35(D), (E).

[9] As with Section 11-44, Section 11-48 does not apply to a public body that chooses to adopt its own procurement procedures. See Va. Code § 11.35(D), (E).

[10] The United States Supreme Court upheld a federal minority set-aside program in Fullilove v. Klutznick, 448 U.S. 448 (1980). Virginia did not pass the Act until 1982. See 1982 Va. Acts Ch. 647.

[11] Those five factors are: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the extent of minority business involvement required by the remedial program and the percentage

of minority group members in the relevant population or work force; (iv) the availability of waiver provisions; and (v) the effect of the set-aside upon innocent third parties. Fullilove supra, 448 U.S. at 510-14 (Powell, J., concurring).

[12]See, e.g., South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), appeal pending; Ohio Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983); Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981, vacated, 457 U.S. 594 (1982) (vacated for failure to reach merits of state statutory issue before deciding federal constitutional claim); Southwest Washington Chapter, Nat'l Electrical Contractors Ass'n. v. Pierce County, 667 P.2d 1092 (Wash. 1983); Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981), cert. denied., 455 U.S. 913 (1982).

[13]See supra note 11.

[14]The court does not hold, however, that such a procedure would render a minority set-aside program unconstitutional. Non-MBEs were required to bear substantial burdens in terms of seeking out and assisting MBEs in the minority set-aside program upheld in Fullilove. See 448 U.S. at 492-93.

[15]When Croson sought to appeal the denial of waiver, the City represented in a

letter that it was a moot issue because the City had decided to re-bid the contract and that the City's decision to re-bid cannot be appealed. In this litigation, however, the City has also represented that Croson's request for appeal the denial of waiver was too late.

[16]The City's decision to re-bid the jailhouse fixtures contract on which Croson had bid does not establish that the City has used its authority to re-bid so as to convert the 30% goal into a rigid requirement. When it decided to re-bid the project, the City had reasonably determined that Croson's request for waiver should be denied, as discussed infra. Given the controversy between the MBE and Croson, the fact that Croson was the only contractor to bid on the contract, and the fact that Croson's request for waiver was reasonably denied, the City's decision to re-bid the contract was a reasonable response to the situation. The City invited Croson to rebid.

[17]It is noteworthy that the administrative guidelines to which Chief Justice Burger referred in this remark, while they do provide a mechanism for complaints about "unjust participation," do not define unjust participation in terms of participation by MBEs whose access to public contracting has not been impaired by the effects of prior discrimination. See id. at 495 (Appendix to Chief Justice Burger's opinion).

[18]There is no evidence that MBEs composed of members of these minority

groups actually have participated in the Plan.

[19]None of the parties has adduced evidence on the proportion of each specific minority group in Richmond's general population or the extent of each group's participation in the City's construction contracts.

[20]Croson has not persuaded the Court with any of the additional evidence it has adduced--after full discovery--that Continental was in fact unavailable, or was taking advantage of the Plan to charge excessive prices. Thus the City's decision was not only reasonable, but appears to have been absolutely correct.

[21]The City has indicated that appeals of denials of requests for waiver are governed by the procedures applicable to a protest of award or decision to award, which must be filed within ten (10) days of the award or the announcement of decision to award. See Richmond, Va. Code Ch. 24.1, Art. VII(C). Assuming this is the appropriate mechanism for appealing a denial of a request for waiver, Croson clearly was untimely.

Article VII(A) of the City Code provides 30 days for appealing where any bidder, offeror, or contractor is "refused permission to, or disqualified from, participating in public contracts." Richmond, Va. Code Ch. 24.1, Art. VII(A). Croson has suggested in its briefs that this is the applicable appeal provision where the City denies a request for

waiver, and that its appeal was therefore not untimely. Even if Croson is correct on this point, the fact remains that the City had elected to rebid the contract, mooting Croson's appeal.

AN ORDINANCE No. 83.69-59

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982) of the Richmond City Code of 1975, as amended; to add definitions of "Minority Business Contractor" and "Minority Group Members", and to add in said chapter a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan."

Patron - Mr. Richardson and Mr. Marsh

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

2. Brand name specification. A specification limited to one or more items by manufacturers' names or catalog numbers.

3. Brand name or equal specification. A specification limited to one or more items by manufacturers' names or catalog numbers to describe the standard of quality, performance, and other salient characteristics needed to meet City requirements and which provides for the submission of equivalent products.

4. Business. Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or any other private legal entity.

5. Change order (unilateral). A written order signed and unilaterally issued by the Director of General Services directing the contractor to make changes which the "changes" clauses of the contract authorize the Director of General Services to order without the consent of the contractor.

6. City Manager of the City of Richmond, Virginia.

7. City. The City of Richmond, a municipal corporation chartered by the General Assembly, Commonwealth of Virginia.

8. City Council. The City Council of the City of Richmond, Virginia.

9. The Director. The Director of General Services of the City of Richmond.

10. Confidential information. Any information which is available to an employee only because of the employee's status as an employee of this City and is not a matter of public knowledge or available to the public on request.

11. Construction. Building, altering, repairing, improving or demolishing any structure, building or road or street highway, and any draining, dredging, excavation, grading or similar work upon real property.

12. Construction management contract. A contract in which a party is retained by the City to coordinate and administer contracts for construction services for the benefit of the City, and may also include, if provided in the contract, the furnishing of construction services to the City.

13. Contract. All types of City agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.

14. Contract modification. Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provision of any contract accomplished by mutual action of the parties of the contract.

15. Contractor. Any person, company, corporation, or partnership having a contract with the City or a using agency thereof.

16. Cost analysis. The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

17. Cost data. Factual information concerning the cost of labor, material,

overhead, and other cost elements, which are expected to be incurred, or which have been actually incurred by the contractor in performing the contract.

18. Cost-reimbursement contract. A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this ordinance, and a fee or profit, if any.

19. Direct or indirect participation. Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.

20. Disadvantaged business. A small business which is owned or controlled by a majority of persons, not

limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.

21. Emergency Purchases. The director may authorize or order the expenditure of funds for the emergency purchases of supplies, materials, equipment and contractual services for the using agencies without recourse to competitive bidding whenever due to circumstances, accidents or failure of mechanical equipment, the purchase of supplies, materials, equipment, and contractual services are essential to protect and preserve the interests of the city and its inhabitants, the proper functioning of the city government and the efficient rendering of public services.

22. Employee. An individual drawing a salary or wages from the City whether elected or not; any non-compensated individual performing personal services for the City or any department, agency, commission, council, board, or any other entity established by the executive or legislative branch of this City and non-compensated individual serving as an elected official of the City.

23. Goods. All material, equipment, supplies, printing and automated data processing hardware and software.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned by minority group members.

27.20. Minority Group Members. Citizens of the United States who are

Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union, committee, club, other organization, or group of individuals.

32. Price analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

33. Pricing data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offer or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

34. Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and

empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

36. Request for proposals. (RFP) All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

37. Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

38. Responsive bidder. A person who has submitted a bid which conforms in

all material respects to the Invitation to Bid.

39. Services. Any work performed by an independent contractor which does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials, and supplies.

40. Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

41. Small Business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Chapter 24.1 of the Richmond City Code of 1975, as amended, be amended by adding therein a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan," as follows:

ARTICLE VIII-A

Minority Business Utilization Plan

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

B. Rules and Regulations

The Director of the Department of General Services shall be authorized to promulgate rules and regulations to implement the above requirements, which rules and regulations shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved.

C. Article Remedial; Effective through June 30, 1988

This article is remedial and is enacted for the purpose or promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors.

This article shall be in force and effect thirty days from adoption, but shall expire and terminate as of the last moment of June 30, 1988.

AN ORDINANCE No. 83-127-116

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982), as amended (Ordinance No. 83-69-59, adopted April 11, 1983) of the Richmond City Code of 1975, as amended, to modify the definition of "Minority Business Enterprise" and to amend and reordain Article VIII-A, "Minority Business Utilization Plan", Part A to include within covered contracts the following "purchase of supplies, materials and equipment, contractual services, contracts of insurance and security bonds."

Patron - Mayor West

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

Article I

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned and controlled or fifty-one per cent minority-owned and operated by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned and controlled by minority group members.

27.20. Minority Group Members. Citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union,

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by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

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41. Small business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or

subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Article VIII-A, Minority Business Utilization Plan, section A, Covered Contracts, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

ARTICLE VIII-A

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

The City of Richmond in awarding contracts to its contractors, including suppliers, for the sale and furnishing of supplies, materials and equipment, for providing contractual services, and for writing and furnishing policies of insurance and surety bonds in which the City of Richmond is the principal insured or party for whom such bond is written and for which policy of insurance or bond the premium charged is billed to the City of Richmond, shall strive to obtain a

minimum of twenty per cent of same from minority business enterprises in the annual aggregate expenditure for such contracts and services.

Supreme Court, U.S.
FILED
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No. 85-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO
LLOYD BRASILEIRO,

Petitioner,

—v.—

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF IN OPPOSITION TO AMICUS CURIAE BRIEF

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Respondent.

OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Respondent respectfully objects to the motion of applicants Inter-American Freight Conference, Sections A and D (IAFC) for leave to file a brief *amicus curiae* in this case, for the following reasons:

(1) The petitioner is an acknowledged member of the applicants conference of ocean carriers and has the identical interest and perspective in protecting the integrity of the tariff as do the applicants, and thus, there is no reason to believe that petitioner has not adequately presented all legal arguments with respect to the tariff. Assuming, *arguendo*, that the tariff is central to at

least one aspect of the Court of Appeals decision below, petitioner's ability to withstand a challenge to an IAFC tariff, without IAFC assistance, was amply demonstrated in one of the cases cited by the applicants in its own Brief (p. 5), *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares, et al.* (including Companhia De Navagacao Lloyd Brasileiro), 508 F.2d 1116 (5th Cir. 1975). It should be evident that applicants are so closely linked in interest to petitioner that granting this motion would simply add another partisan to the case for no significant reason.

(2) Applicants have stated, in support of its motion, that petitioner has not presented the tariff for the Court's consideration (p. ii). On its face, therefore, applicants' motion should be denied under this Court's well-settled rule that it will not consider arguments by *amicus curiae* not advanced by the parties, *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, n.2, p.60 (1981), *Bell v. Wolfish*, 441 U.S. 520, n.13, p.531 (1979), *Knetsch v. United States*, 364 U.S. 361, 370 (1960). If on the other hand, it is deemed that petitioner has presented the tariff for the Court's consideration, then applicants' reason for entering the case as *amicus curiae* lacks factual support and its motion likewise should be denied.

WHEREFORE, it is respectfully requested that the instant motion be denied.

Respectfully submitted,

IRVING RONALD STORCH
Counsel for Respondent

Dated: March 25, 1986

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Argument	1
1. The Tariff Provisions Not Included In The Record Should Not Be Considered On This Petition	1
2. The Decision Below Can Be Sustained Without Reference To The Tariff	3
Conclusion	4

TABLE OF AUTHORITIES

	Page
CASES:	
Bell v. Wolfish, 441 U.S. 520, n.13, p.531 (1979)	ii
Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares, et al, 508 F.2d 1116 (1975)	ii
Knetsch v. United States, 364 U.S. 361, 370 (1960)	ii
Singleton v. Wulff, 428 U.S. 106, 120 (1976)	2
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, n.2, p.60 (1981)	ii

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VS.

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

BRIEF IN OPPOSITION TO *AMICUS CURIAE* BRIEF

On the assumption that the motion of applicants Inter-American Freight Conference, Section A and D to file *amicus curiae* brief is granted, this brief is submitted in opposition thereto and is limited only to the issue advanced by the applicants.

Argument

1. *The Tariff Provisions Not Included in the Record Should Not be Considered on this Petition.*

This case was decided in the District Court on stipulated facts which included shipping documents and provisions of petitioner's (and applicants') tariff. Those provisions did not include the provisions now offered by applicants in its Appendix pages

A-1, A-2, A-3 and A-4 attached to its *amicus curiae* brief*. It is a further attempt, this time by applicants, to introduce new evidence at the appellate level which was not part of the record below and should once again be rejected, as it was by the Court of Appeals. While petitioner does not present the added provisions of the tariff in its Petition for Certiorari, petitioner did so in its brief to the Court of Appeals. In rejecting this effort, the Court of Appeals said:

> "And despite Lloyd's attempts to introduce new evidence at this stage, we are limited to the record, and the record clearly shows that the freight rate was based on the value of the goods." (Petition for Certiorari, A-28)

The guiding principle on whether new issues may be considered on appeal was enunciated by this Court in the case of *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), where it said:

> "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals to be exercised on the facts of individual cases."

In light of this principle and the facts and circumstances of the case, it cannot be concluded that the Court of Appeals abused its discretion in rejecting the introduction of new evidence, consisting of a provision of petitioner's tariff not before the District Court.

While a tariff may have the force of law once it is established, the determination of the applicable tariff and the freight rates are always questions of fact. The tariff provision which was made part of the record on appeal was furnished by petitioner to respondent's counsel on discovery and was made the subject of a stipulation of facts entered into by the parties which formed the basis for the District Court's Finding 21 (A-6, Petition for Certiorari).

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* Only Appendix page A-5 was part of the record below.

Lastly, it should be noted that to permit petitioner, through the help of applicants, to submit new matter at this level of review would be a radical departure from our system of jurisprudence and would be far more damaging than the alleged impossible choice faced by members of the conference in the future. Assuming that Rule 12 of the IAFC tariff constitutes relevant matter on the issue of choice of rates in a similar case, the members would be well advised to raise that issue on the trial level. Clarity and more explicit bills of lading and tariffs would also obviate any dilemma they might face generally on the package limitation issue.

2. *The Decision Below Can Be Sustained Without Reference To The Tariff.*

At the outset, it should be observed that the petitioner's and applicants' tariff is only peripherally involved in this case. The issue to which it relates, i.e. whether respondent had a choice of rates when it declared the nature and value of the goods, only becomes relevant if the pallet is deemed to be a package within the $500 per package Cogsa limitation of liability provisions. The District Court did not so find and the Court of Appeals, while concluding that the parties' intent on that issue was ambiguous, did not set aside the District Court's finding as being clearly erroneous.

Having found the petitioner's bill of lading to be a contract of adhesion, the Court of Appeals could have ended the case at that point by simply stating that the District Court's finding that the pallet was not a package was not clearly erroneous or that the ambiguity in the bill of lading should be resolved against the petitioner.

Accordingly, the decisions below could be sustained without any reference to the tariff altogether, and therefore the additional provisions of the tariff offered by applicants would not alter the result.

Conclusion

Respondent therefore respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

Irving Ronald Storch
Counsel for Respondent